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ABSTRACT

The Family and Medical Leave Act (FMLA) entitles many faculty members to 12 weeks of job-protected unpaid leave each year to take care of a serious health condition or a family obligation such as the birth of a child, the arrival of an adoptive or foster child, or the serious health condition of a spouse, child, or parent. This guidebook is a resource for those who want to understand how the FMLA applies to the academic workplace. It is based on questions received from faculty members, administrators, and lawyers about the application of the FMLA to faculty members at colleges and universities. It provides general legal information and resources, but is not intended as legal advice. Appendixes list helpful Web sites and telephone numbers and helpful books and print resources. (SLD)

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The Family and Medical Leave Act

Questions and Answers for Faculty

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Questions and Answers for Faculty

Donna R. Euben and Saranna R. Thornton

American Association of University Professors
Washington, D.C.

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Introduction

The American Association of University Professors (AAUP) receives many inquiries from professors, administrators, and lawyers about the application of the federal Family and Medical Leave Act (FMLA) to faculty members at colleges and universities. The federal FMLA and its regulations have triggered a number of questions about their application to faculty members. Some of these questions and answers—a few of which can only be speculative because of the dearth of case law—follow.

Under the FMLA, most full-time faculty and some part-time faculty are entitled to take up to twelve weeks of unpaid, job-protected leave in a twelve-month period for certain family and medical reasons. As a faculty member, you may be entitled to such unpaid leave for: (a) the birth of your child; (b) the placement of a child with you for the purposes of adoption or foster care; (c) the care of your spouse, child, or parent who is suffering from a "serious health condition"; and (d) your own serious health condition.

The purpose of the FMLA is to enable employees, including professors, to integrate the obligations of work and family more easily.

Congress enacted the FMLA in 1993 to promote the stability and economic security of families. The act is intended to achieve this goal in a manner that accommodates the interests of employers in workplace efficiency, minimizes the potential for employment discrimination based on gender and pregnancy, and promotes equal employment opportunities for both women and men. A recent survey of employers and employees indicates "that family and medical leave is becoming a more important part of the experience of employers and employees."[i]

Some states and municipalities also have laws that provide some form of family and medical leave benefits. In addition, faculty members may have additional family and medical leave benefits under their letters of appointment, faculty handbooks, and, where applicable, collective bargaining agreements.

This guide provides general legal information about the FMLA in the academic workplace. This guide is not exhaustive, and is not intended as legal advice. Rather, the AAUP seeks to educate the academic community by providing a general overview of this developing area of law. The Association urges you to consult a lawyer experienced in higher education or employment law if you have questions about your specific circumstances.

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i. Jane Waldfogel, "Family and Medical Leave: Evidence from the 2000 Surveys," U.S. Department of Labor Bureau of Labor Statistics *Monthly Labor Review* 124:9 (September 2001): 17–23.

Questions and Answers

I. WHO IS COVERED BY THE FMLA?

1. Question. Are most U.S. colleges and universities obligated to provide FMLA leave?

Answer. Yes. The FMLA applies to:

- all private colleges and universities that employ fifty or more employees for at least twenty workweeks in the current or preceding year; and
- most public colleges, as public agencies, "regardless of the number of employees." § 825.104 & § 825.108.[1]

2. Question. Who is entitled to FMLA benefits?

Answer. To be eligible for benefits under the FMLA, a faculty member must have had at least twelve months of total service with the college or university when the leave begins. § 825.110(a)(1). These twelve months need not be consecutive or continuous. For example, a full-time faculty member on a nine-month contract would qualify for FMLA benefits after the third month of the professor's second year of appointment. Work during any part of one week counts as one entire week of service. § 825.110(b). For example, a faculty member who works for one or more days during the week that includes a two-day fall break, or who works for one or more days during Thanksgiving week (which would include a two-day break), would be regarded as having worked for the entire week.

A faculty member must have also worked at least 1,250 hours during the twelve months immediately preceding the start of the FMLA leave. § 825.110(a)(2). In counting the 1,250 hours, time does *not* count during which a college or university pays salaries but a professor does not work, such as paid vacation. However, time that a faculty member works, not the time for which he or she is actually compensated, counts toward the 1,250 hours. The U.S. Department of Labor (DOL) presumes that full-time salaried employees, including faculty members, who have worked for an employer at least twelve months are FMLA-eligible. In addition, some courts have ruled that the FMLA covers former employees as well. The DOL regulations specifically provide that "full-time teachers . . . of an . . . institution of higher education . . . are deemed to meet the 1,250 hour test." § 825.110(c). Under that rebuttable presumption, the burden rests on the administration to demonstrate "clearly" that a professor did not work 1,250 hours. § 825.110(c). The regulations provide that the determination of 1,250 hours "is not limited . . . by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer." § 825.110(c).

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1. All citations refer to Title 29 of the Code of Federal Regulations, Chapter V, Part 825, "The Family and Medical Leave Act of 1993," unless otherwise indicated. 29 CFR § 825.

3. **Question.** Who is considered to be a "family member" under the FMLA for whose care a professor may be entitled to leave?

Answer. The federal FMLA covers "spouse," "parent," and children. Spouse is defined as a "husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized." § 825.113(a). Parent means "a biological parent or an individual who stands or stood in loco parentis to an employee when the employee was a son or daughter." § 825.113(b). "Son or daughter," under the FMLA, is defined as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18 or age 18 or older and 'incapable of self-care because of a mental or physical disability.'" § 825.113(c). Federal regulations state that an employer may require the employee who is requesting leave to explain or document the family relationship to the person (e.g., a birth certificate, adoption papers, and so on).

4. **Question.** I am a part-time faculty member who has taught at the university for more than twelve months. Am I entitled to FMLA leave?

Answer. It depends. You must determine whether you have worked 1,250 hours in the twelve months preceding your FMLA leave by putting together a record of the number of hours you have spent teaching, grading, preparing lectures, holding office hours, attending department meetings, serving on committees, writing letters of recommendation, and so on. The evaluation of how many hours you have worked should not be based on a letter of appointment that does not reflect all the hours during which you have served your institution.

Under the Fair Labor Standards Act (FLSA), "hours worked" is defined to include (but is not limited to) "all time spent in physical or mental exertion (whether burdensome or not) that are controlled by the employer and pursued necessarily and primarily for the benefit of the employer." § 785.7 & § 785.8. Therefore, responsibilities beyond that required by your letter of appointment may count for computing the 1,250 hours of work required to qualify for FMLA benefits if: (1) the work is for the benefit of your institution; (2) the administration knows or has reason to believe you are doing such work; and (3) while knowing or having reason to believe that you are doing extra work, your administration does not use its "managerial powers" to stop you from performing this work. § 785.7, § 785.8, § 785.11, & § 785.13. Therefore, the number of hours you serve your college or university is not limited only to time on campus or teaching. § 785.12.

Some examples:

- You are a part-time professor, and not formally assigned to serve on university committees, such as admissions or curriculum review. Nevertheless, you serve on a departmental curriculum review committee with the knowledge of your dean. Accordingly, the amount of time you spend on that committee should count toward the 1,250 hours in determining whether you are eligible for FMLA benefits.

- You are a part-time professor who spends time applying for outside research grants from various sources, such as the National Science Foundation or the National Institutes of Health. Assuming the funds awarded will "benefit" your college or university in some way, such as by providing funds to finance graduate student research assistantships or for administrative "overhead," and assuming your department chair, dean, or, for example, vice president for development knew you applied for such outside funding and did not make an effort to stop you, then the time spent applying for the grant and carrying out the proposal may also count toward the 1,250 hours in determining your eligibility for FMLA benefits.

- A graduate student at your institution asks you, a part-time professor, to serve on her dissertation committee and you do so with the knowledge of your department chair. The time spent meeting with the graduate student, reviewing drafts of the dissertation, preparing for and attending the dissertation defense, and conferring with other members of the dissertation committee may count toward the 1,250 hours for FMLA purposes.

Note: You are not required by law to log your actual work hours. Doing so, however, may help to establish your eligibility for FMLA leave. As a general rule, you have worked 1,250 hours in the last 12 months if you have worked:

- 24 hours in each of the 52 weeks of the year; or
- over 104 hours in each of the 12 months of the year; or
- 40 hours per week for more than 31 weeks (or 7 months) of the year.

5. **Question.** I am a full-time faculty member, but I have a course release for research and so I only teach two courses per semester. Do I meet the 1,250-hour eligibility test for FMLA benefits?

Answer. Probably. The regulations presume that "full-time teachers . . . of an . . . institution of higher education . . . meet the 1,250 hour test." § 825.110(c). Time spent on research counts just like time spent teaching or holding office hours. To dispute your eligibility for FMLA leave, the administration must clearly demonstrate that you did not work 1,250 hours on teaching, service, and research during the twelve months preceding your proposed date of leave.

6. **Question.** I am a full-time faculty member and I work at home two days a week. I spend this time grading papers, preparing lectures, and engaging in research for a book. Does my work at home count for the purposes of determining my eligibility for FMLA leave?

Answer. Yes, as long as your department chair or dean knows that you are carrying out your responsibilities—grading papers, writing letters of recommendation, and undertaking academic research—it does not matter whether you work in the office or at home. § 785.12. If you attend an out-of-town academic conference, for example, to interview candidates for a faculty position

at your university, or if you attend a conference to present a paper, the time spent on these activities counts toward the hours you have worked for FMLA-eligibility purposes. § 785.39.

7. **Question.** I am a full-time visiting professor with a multi-year contract. Do I qualify for FMLA benefits?

Answer. Yes, so long as you have already worked at the college for at least twelve months and you meet the 1,250-hour requirement.

8. **Question.** I am a graduate student instructor teaching a full course load at my university while I finish my degree. Do I qualify for FMLA benefits?

Answer. Probably, as long as you have already worked at the university for at least twelve months and you have worked 1,250 hours in the twelve months preceding commencement of FMLA leave as a graduate student instructor and/or in some other capacity, such as a teaching assistant, research assistant, or tour guide for the Admissions Office. Time you spend researching and writing your dissertation probably would not count toward the 1,250-hour requirement. An exception might be, perhaps, if a member of your dissertation committee obtains an outside research grant that puts you on the university's payroll as a research assistant on a joint research project, the results of which you will also use as a part of your dissertation.

9. **Question.** My husband and I share an appointment in the history department at our college. Are we both entitled to FMLA benefits?

Answer. Yes, as long as both of you have been employed at the institution for at least twelve months and both of you, individually, have worked at least 1,250 hours in the twelve months preceding commencement of FMLA leave, which includes time spent on teaching and nonteaching duties, such as attending faculty meetings, advising individual students, and writing an article.

Under the FMLA, however, an administration "may" choose under some circumstances to limit the total amount of family leave taken by the two of you. Spouses working for the same institution, whether they share an appointment or have separate full-time appointments, or work on the same or different campuses, may be entitled only to a combined total of twelve weeks of family leave for the birth of a child, placement of a child for adoption or foster care, or to care for one of the professor's parents with a serious health condition. § 825.202(a) & (b). For example, if the professor-wife takes ten weeks of FMLA leave to care for a newly adopted child, then the professor-husband may take only two weeks of FMLA leave during the remainder of the twelve-month period should one of his parents suffer a serious health condition and need his care.

Although leave may be limited in some circumstances to a combined total of twelve weeks for both professors, this amount of leave can be extended to up to twelve weeks for each professor if the professor either has a serious health condition or is caring for a child with a serious health condition. For example, if both professors took six weeks off for the placement of a foster child, each

professor could use an additional six weeks for his or her own serious health condition. § 825.202(c).

10. Question. I am a faculty member at a state college. Do I qualify for FMLA leave?

Answer. Yes. Under the FMLA, an "employer" includes any "public agency," including most state colleges and universities. § 825.108. However, some state colleges and universities are successfully arguing in court that they are "immune" from FMLA suits under the Eleventh Amendment of the U.S. Constitution. Such cases, in which the state or institution has not "waived" its immunity, preclude individuals from seeking monetary damages for violations of the FMLA by state employers in particular jurisdictions.[2] Two states—Minnesota and North Carolina—have waived sovereign immunity to FMLA lawsuits by state employees. In the end, however, state employees, including state college and university professors, should make every effort to protect their FMLA-type benefits through state laws, local ordinances, faculty handbooks, and, if appropriate, collective bargaining agreements. Even if the federal courts in your area have ruled that public colleges and universities are immune from FMLA suits by individuals for monetary damages in federal court, you may still file a suit asking the court to rule that your administration must behave in ways that do not violate your FMLA rights. The EEOC may also file a lawsuit against your institution and request monetary damages for you.

II. WHAT ARE THE FMLA NOTICE OBLIGATIONS?

To take FMLA leave you must provide your administration with certain information in a timely fashion. The notification requirements vary somewhat for leave that is foreseeable, such as the birth of a child, and leave that is not foreseeable, such as the illness of your spouse. A sample notification form is available from the U.S. Department of Labor Web site at <www.dol.gov/dol/esa/public/forms/whd/index.htm>.

1. Question. Whom do I notify at the university of my need for leave? My department chair? My dean? The director of human resources?

Answer. Most colleges and universities have a policy about whom you should notify about leave requests. Check your faculty handbook or contact a benefits specialist in your institution's Office of Human Resources or the dean of faculty.

2. Question. I need nonemergency surgery for a serious health problem. How much notice must I give my administration for FMLA leave?

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2. See, e.g., *Garrett v. University of Alabama at Birmingham Bd. of Trustees*, 193 F.3d 1214 (11th Cir. 1999), revised on narrower grounds, 531 U.S. 356 (2001); *Driesse v. Florida Board of Regents*, 26 F. Supp. 2d 1328 (D. Fl. 1998); *Philbrick v. University of Connecticut*, 90 F. Supp. 2d 195 (D. Conn. 2000); *Sims v. University of Cincinnati*, 46 F. Supp. 2d 736 (S.D. Ohio 1999), *aff'd*, 219 F.3d 559 (6th Cir. 2000); *Schall v. Wichita State University*, 2000 Kan. LEXIS 530 (Kan. 2000). But see *Hibbs v. Department of Human Resources*, 2001 U.S. App. LEXIS 26364 (9th Cir., Dec. 11, 2001).

Answer. When the need for leave is foreseeable, such as the birth of a child or nonemergency surgery, you must give your administration at least thirty days' notice. § 825.302(a). For the birth of a child, for example, you should provide notice about the anticipated time when you will begin leave and the expected duration of the leave. § 825.302(c). In planning such medical treatment for your own serious health condition or for the serious health condition of your parent, child, or spouse, you are required to consult with your administration and make reasonable efforts to schedule the leave in as nondisruptive a way as possible. § 825.302(e).

For example, if you need physical therapy following orthopedic surgery and you regularly teach on Mondays, Wednesdays, and Fridays, the administration may request that you schedule the physical therapy treatments for Tuesdays and Thursdays, thereby taking your FMLA leave time during your nonteaching duties. However, if your physician or other qualified health care provider does not approve of the revised treatment schedule for some reason, then it would appear that your administration would need either to change your teaching schedule to accommodate your medical needs or to grant your initial FMLA leave request. § 825.302(e).

If you can schedule your medical treatment for nonclass time and still carry on all your nonteaching duties, of course, you may not need to request FMLA leave for your physical therapy.

The administration of your institution may ask you to request FMLA leave in writing, but it may not deny or delay your request if you gave timely oral notice. § 825.302(d). While the law does not require you to write the administration of your need for leave, you should probably do so to avoid any later questions about the exact date of notification. It is also wise to keep a copy of that letter.

The university may not take any adverse action against you for failing to provide advance notice of leave if the university has not posted notice of FMLA requirements or otherwise given you notice of these requirements. § 825.300 & § 825.304(c).

Exceptions to the thirty-day pre-notification requirement exist when the provision of such notice is not "practicable." § 825.302(a). For example, you may not know *exactly* when you will need to take leave for the adoption of a child, or you may have a foreseeable need for leave, such as chemotherapy, but your doctor wants to schedule your treatment immediately. In cases of foreseeable leave where it is not possible to provide your employer with thirty days' notice, you should instead notify your employer "as soon as practicable," i.e., normally within one to two business days. § 825.302(b). If state law, leave policies in your faculty handbook, or, if applicable, a collective bargaining agreement allows for less advance notice of the need for leave, your administration may not substitute stricter FMLA notice requirements. § 825.302(g). If your administration needs more information to process your leave request than you initially provided, the administration may request additional information. § 825.302(c).

When requesting FMLA leave, you do not have to mention the FMLA. Assuming that you are a professor eligible for FMLA leave, as long as you tell your administration that you need leave for an FMLA-qualifying reason, such as the birth of a child or your own serious health condition, you are entitled to the leave and it is up to the administration to designate your time off as FMLA leave

or to request additional information from you if necessary to approve your FMLA leave. § 825.208(a) & § 825.302(c).

Finally, if your leave is foreseeable and you fail to notify your administration in a timely manner, the college or university may elect to waive the thirty-day notification requirement or it may hold up your leave until at least thirty days after you have provided notification. In other words, if you fail to provide sufficient notice to the school, it may delay, but cannot deny, your FMLA leave. § 825.304(b).

3. **Question.** I will be adopting a child sometime during the fall semester, but the adoption agency cannot provide an exact date. My department plans the fall teaching schedule in February. Must I notify my chair in February regarding the date I want to begin leave in the fall?

Answer. You are not legally required to notify your chair of your need for leave so far in advance. However, at the same time, you may wish to notify your department significantly earlier than the thirty-day legal requirement to ensure a smooth transition for your students and the department in finding a substitute professor.

If the adoption agency provides you at least thirty days' notice of when you must pick up the child, your need for leave is clearly foreseeable, and you must give your employer at least thirty days' notice of your need for leave. On the other hand, if the planned adoption date occurs suddenly, with less than thirty days' notice, or if the date changes, you must provide your administration with notification of your need for leave "as soon as practicable."

4. **Question.** My parent needs emergency surgery. What kind of notice do I need to provide my administration?

Answer. If you (or your child, spouse, or parent) experience a medical emergency that causes a serious health condition, it may be impossible to provide your administration advance notice and such notice may not be required. If you are personally unable to provide such notice, your spokesperson, such as a spouse, can do so "as soon as practicable under the facts and circumstances of the particular case." § 825.303(a) In such circumstances you or your representative should notify your administration either in person, or by letter, telephone, fax, or e-mail of your immediate need for leave. § 825.303(b). To avoid any questions about whether and when you notified your administration, it is probably best that you notify the school in writing. You or your spokesperson may be expected to provide more information to the administration, such as the expected duration of leave, when it is practical to do so. § 825.303(b).

5. **Question.** I can find no reference to the FMLA in our faculty handbook. Is the administration required to provide me information about the FMLA?

Answer. If a faculty handbook exists that describes benefit policies, such as salaries and leaves (sabbatical, sick, etc.), the handbook must also include information about the FMLA. § 825.301(a)(1). Furthermore, administrators must

post information about the FMLA in "conspicuous places" on campus. § 825.300(a). When you request leave for FMLA purposes, the administration is also required to provide you with a written notice stipulating what expectations and obligations you must meet as part of your leave, including the consequences of failing to meet these obligations. § 825.301(b). This written notice should include information pertaining to whether you will need to furnish medical certification of a serious health condition, substitute accrued paid leave for unpaid FMLA leave, maintain health insurance premium payments, and so on. § 825.301(b) & (c).

6. Question. I need to take FMLA leave for my own serious health condition. Do I need to provide a doctor's note to the administration? If so, what information must be included in such a medical certification?

Answer. If you have a serious health condition that makes you unable to perform one or more of the essential functions of your job, your administration may require you to provide medical certification of that condition. (The administration may also require that you provide a medical certification from a qualified health care provider in support of your FMLA leave to care for your seriously ill spouse, child, or parent.) § 825.305(a).

If you provide an administrator with notification of your need to take FMLA leave for a reason that is foreseeable, such as elective surgery, and the administrator responds with a request for medical certification, you should provide the medical certification before the leave begins. § 825.305(b). If that is not possible, you have at least fifteen calendar days after the administrator's request to provide it. More time may be allowed, depending on the particular circumstances of your situation. § 825.305(b). The administrator should request certification within two days of when you first give notice, unless the administrator later has "reason" to question the appropriateness of the leave. § 825.305(c).

The U.S. Department of Labor's WH-380 form lists all the information that must be provided in a medical certificate, and "the information on the form must relate only to the serious health condition for which the current need for leave exists." § 825.306(b). If your health care provider provides this information, either on the WH-380 form or in a note, the administration may not require additional information, such as your medical records, as a condition for approving your leave. The WH-380 form is available at <www.dol.gov/dol/esa/public/forms/whd/index.htm>.

If the administration requires you to provide a medical certification for foreseeable FMLA leave and you fail to do so, the administration may delay the start of your leave until you provide the required information. § 825.311(a). If the administration requires you to provide medical certification for an FMLA leave that is *not* foreseeable and you fail to do so, the administration may refuse to designate the leave you take as FMLA leave. In this case, depending on the institution's policies, your leave may not be subject to the protections of FMLA leave, such as job protection and maintenance of your health insurance benefits. § 825.311(b).

7. **Question.** I requested FMLA leave from my dean a month ago, but I still do not know whether my request was approved. My department chair and I need to make plans. How much time does the dean have to notify me if my request for leave was approved?

Answer. The dean must respond to your request for leave within a "reasonable time" after you have provided notice of your need for FMLA leave. § 825.301(c). A "reasonable time" is defined as one to two business days after receiving your request for leave. § 825.301(c). If the dean determines that she needs more information than you originally provided, she must also notify you of that need within a "reasonable time" of receiving your request for leave. § 825.301(b) & (c)(2). If your dean requests additional information (e.g., a medical certification of your need for leave), then the dean would normally have up to two business days following your provision of that additional information to notify you of the status of your leave request. If the dean fails to respond to your request for leave within a "reasonable time" she may not take any action against you for any failure on your part to comply with the FMLA notice obligations. § 825.301(f). If you fail to hear from your dean about the status of your request within a reasonable amount of time, you may want to send a memo or an e-mail as a gentle reminder that you and your department chair would like to know the status of your request so the two of you can make plans for covering your absence. Copy yourself on the e-mail or memo that you send. If there are any disagreements about whether or not you qualify for FMLA leave, discuss them with your dean. If you still haven't heard from your dean by the prospective start date you listed for your leave, any leave you do take is probably subject to the full protections of the FMLA.

8. **Question.** My request for twelve weeks of FMLA leave was approved, but my department chair has asked me to check in every four weeks to report on my intention to return to work following the end of my leave. Must I comply?

Answer. Yes. Your department chair (or another university official) may require during your FMLA leave periodic reports on your status and intention to return to work. However, the department chair may not require these reports in an unfair way. § 825.309. For example, it would be impermissible to demand periodic reports only from women on leave following childbirth and not from professors (men and women) taking leave for other types of serious health conditions.

III. FMLA Leave for the Birth of a Child

Under the FMLA parents may take up to twelve weeks of unpaid leave following the birth of their child.

1. **Question.** I am pregnant. How much family leave am I entitled to?

Answer. Under the FMLA you are entitled to up to twelve weeks of unpaid leave within a twelve-month period. § 825.200. If needed, you can take leave before the baby is born for prenatal care and for any pregnancy-related complications that necessitate your absence from work. § 825.112(c). You may

also take leave after the baby is born to recover from childbirth and to spend time caring for the baby. § 825.200.

Two types of leave are related to the birth of a child: disability leave and childcare leave. Except in rare circumstances, only the leave taken to recover from the disability resulting from childbirth will be paid, if any paid short-term disability leave is available at your college or university. This paid leave will typically be for six to eight weeks, but sometimes may be longer. There are three situations that might allow you to take some or all of the twelve weeks of leave as *paid* leave:

- If your institution has a policy (written or unwritten, formal, informal, or past practice) that provides *paid* leave for short-term medical disabilities, and you qualify for this benefit (by meeting the requirements of your employer's disability plan), then your administration must permit you to take paid leave before and following the birth of your child on terms at least as generous as those allowed for people taking medical leave for non-maternity-related reasons. § 825.702(f) & § 825.207(d)(1). For example, if your institution has an *informal* medical leave policy that has provided fully paid leaves for faculty members who are medically disabled for up to six months, then you, too, are entitled to paid medical leave of up to six months' duration for any medical disabilities associated with the pregnancy and/or childbirth.

- If your institution has a *formal* sick-leave plan that allows professors to accrue sick leave and you have accumulated sixty days of sick leave when you give birth, then you may choose (or the administration may require you to elect, § 825.207(a)] to substitute up to twelve weeks of paid leave for any period during which you are medically disabled before or following the birth of your child. § 825.207(c).

- The U.S. Department of Labor has issued a Final Rule in the *Federal Register* (June 13, 2000, Volume 65, Number 114, Page 37209–37227) to permit states to administer their Unemployment Compensation (UC) programs in such a way as to provide partial wage replacement, on a voluntary, experimental basis, to parents who take FMLA leave or who otherwise leave employment following the birth or adoption of a child. States are not required to use their UC programs to provide paid FMLA leave for parents following the birth or adoption of a child.

Thus far no state has passed "baby" UC laws. Five states—California, Hawaii, New Jersey, New York, Puerto Rico, and Rhode Island—have temporary disability insurance (TDI). Such insurance provides between six to eight weeks of partially paid leave for maternity. Because this leave is based on the concept of "disability," it is available only to mothers who physically give birth. If you suffer serious complications from the birth of a child, TDI payments can last up to twenty-six weeks.

If you have a normal delivery, your period of disability will probably be around six weeks. So, for example, you might take the first six weeks of FMLA leave as paid leave and another six weeks as unpaid leave. If you have a Cesarean delivery, or other postpartum complications, your doctor or nurse-

midwife may determine that your period of disability is eight weeks long. Then, you might take eight weeks of paid FMLA leave and up to four more weeks of unpaid leave.

2. **Question.** I want to take FMLA leave following the birth of my child. When must my twelve weeks of leave conclude?

Answer. Any FMLA leave taken for the birth of your child (or for adoption or foster care placement) must be completed within twelve months of the birth or placement date of the child, unless state law or your institution's policy provides for a longer leave period. § 825.201.

For FMLA leave taken for your own serious health condition or to care for a child, spouse, or parent with a serious health condition, no time limit exists within which leave must be concluded. § 825.200. For example, if you took "part-time" FMLA leave, taking off four hours per week for medical treatments for a chronic, serious health condition, you could theoretically take your FMLA leave for years, as long as the accumulated total amount of leave does not exceed twelve weeks a year.

3. **Question.** If I am having a difficult pregnancy, can I take some FMLA leave before the baby is born?

Answer. Yes. The FMLA allows for any pregnancy-related leave that is medically necessary. Generally, the FMLA leave you take while you are pregnant would not be for the birth of your child, but for your own serious health condition. § 825.112(c). "Serious health condition" is defined as including "any period of incapacity due to pregnancy or for prenatal care." § 825.114(a)(2)(ii). And so both the leave you take before and after your baby is born will count toward your twelve weeks of FMLA leave. Check your university's short-term disability policy (i.e., sick-leave policy) to determine if you can take medically necessary pregnancy leave as *paid* leave. But twelve weeks is the maximum amount of time to which you are entitled, no matter how that leave is characterized (e.g., whether it is for pregnancy, childbirth, or a "serious health condition").

4. **Question.** My wife, who works outside the home but is not employed by the university, is pregnant. How much FMLA leave am I entitled to?

Answer. You are entitled to up to twelve weeks of leave in the twelve-month period following the birth of your child. § 825.112(b). Unless your university has a leave policy that provides for *paid* parental leave, you will be able to use only your accumulated paid vacation leave or paid personal leave, so your leave will probably be mostly unpaid. § 825.207(e) ("No limitations may be placed by the employer on substitution of paid vacation or personal leave . . ."). While male professors do not experience medical disabilities as a result of childbirth, they may be entitled to combine paid sick leave with FMLA leave. For example, if your university has a policy that allows employees to use paid sick leave for FMLA-qualifying reasons (e.g., parental leave) you may be able to

combine this leave with your FMLA leave to take a paid period of time off following the birth of your child.

5. **Question.** My same-sex domestic partner is pregnant. How much FMLA leave am I entitled to?

Answer. It depends on whether or not you will be legally adopting the child when it is born and how your state, municipality, faculty handbook, and, if applicable, collective bargaining agreement treat same-sex domestic partners. Under the federal FMLA, a spouse is defined as an individual legally recognized as the faculty member's husband or wife in the state in which the professor lives, and includes spouses in common-law marriages. § 825.113(a). If you are able to adopt the child in your state, you then may be entitled to take FMLA leave for the placement of your adopted child. If you live in Vermont, and have participated in a civil union ceremony with your same-sex domestic partner, check with your state government to determine if the state classifies you and your partner as spouses for the purpose of receiving FMLA benefits.

6. **Question.** My baby is due in late May. We do not have summer school at my college and faculty normally spend summers doing research, preparing new courses, or engaging in other service work for the school. When I requested to take FMLA leave during the fall semester, my dean told me to count the twelve weeks of summer break as FMLA leave and report back to teaching full time in the fall. Must I do so?

Answer. Probably not. If you have a baby; adopt a child; care for a seriously ill parent, spouse, or child; or use summer break to recover from your own serious health condition, you may still be entitled to twelve weeks of FMLA leave during the regular school year. § 825.200(f). The FMLA specifies that leave used does not count against your twelve-week entitlement as long as that leave is taken when your employer's business activity has temporarily ceased and when employees are generally not expected to report for work for one or more *full* weeks. And so, only the time you were unable to teach before the summer (May) would count toward your twelve-week entitlement.

Leave that is taken for an FMLA-qualifying reason during a week when there is a holiday and school is open for only part of the week does count as one full week of FMLA leave. § 825.200(f). Thus a week of FMLA leave taken the week of Thanksgiving would count as one full week of FMLA leave, assuming that classes are scheduled on at least one day during that week. But leave utilized during full weeks of winter break, spring break, or summer break do not count against your twelve-week FMLA entitlement.

As previously noted, you would probably still be eligible for FMLA leave in the fall as you desire under the 1,250-hour requirement because time that a faculty member works, not the time for which he or she is actually compensated, counts toward the 1,250 hours. § 825.110(c).

IV. FMLA Leave for Adoption or Foster Care Placement of a Child

Like leave for the birth of your biological child, twelve weeks of FMLA leave for placement of an adopted or foster care child is available to professors who are parents.

1. **Question.** I am adopting an older child. My college tells me I can take FMLA leave only for the adoption of a baby. Is this true?

Answer. No. The FMLA applies to the adoption or foster care placement of any child under the age of eighteen. § 825.113(c).

2. **Question.** I am adopting a child. May I take FMLA leave to complete the home study and meet the other legal requirements involved in the adoption process before the child is placed with me?

Answer. Yes, you are entitled to FMLA leave for an absence from work required for the adoption to proceed, as long as you have not used up your annual twelve weeks of FMLA leave. § 825.112(d). But remember that you may not need to take the time for the home study or other legal adoption requirements from your annual twelve weeks of FMLA leave. For example, if you teach Mondays, Wednesdays, and Fridays, you may choose to schedule the home study, or other required meetings, on Tuesdays and Thursdays. By doing so, you continue to perform all your teaching and nonteaching responsibilities (e.g., holding office hours, grading papers, doing research, and attending committee meetings) while saving up your unpaid FMLA leave.

3. **Question.** I am adopting a child, but I do not know exactly when the child will arrive. The adoption agency says the child probably will not arrive until midsemester. My department chair wants me to take the entire semester as FMLA leave. Must I do this?

Answer. You, not the department chair, decide how much FMLA leave to take for the adoption of your child. For example, your department chair may not require that you take twelve weeks of FMLA leave when you want to take only eight weeks to care for a newly adopted child. § 825.203(d) ("An employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave . . ."). Special rules apply to primary and secondary school teachers, *not* college or university faculty, about taking leave near the end of an academic term. § 825.600. Nevertheless, you may wish to accommodate the needs of your students and your colleagues. For example, you may determine that it is too disruptive to the learning of your students to return midsemester and so, if the administration agrees, you might instead assume administrative responsibilities or a research assignment for the rest of the semester with full pay and benefits.

V. FMLA LEAVE FOR A SERIOUS HEALTH CONDITION

The FMLA permits faculty members to take leave when they are suffering from a "serious health condition" or when they are "needed to care for" a spouse, child, or parent suffering from a serious health condition. Many FMLA-related disputes arise from disagreement about what constitutes a serious health condition. A medical problem may qualify as a serious health condition under the FMLA and as a disability under the Americans with Disabilities Act (ADA) or Workers' Compensation. Also, check your institution's sick-leave policy, which may provide either paid or unpaid leave for less serious illnesses or injuries. § 825.114 & § 825.116.

1. **Question.** I want to take FMLA leave for my own medical needs. How do I know if my medical problem qualifies as a "serious health condition" under the FMLA?

Answer. A serious health condition is an illness, injury, impairment, or physical or mental condition that involves the following:

(a) inpatient care in a hospital, hospice, or residential medical care facility including not only the period during which you are incapacitated but also any subsequent treatment you might need in connection with the inpatient care you received; or

(b) continuing treatment by a health care provider, including one or more of the following:

i) a period of incapacity of *more* than three consecutive calendar days, plus any subsequent treatment or any subsequent period of incapacity relating to the original condition that also involves either treatment two or more times or treatment by the health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider; or

ii) any period of incapacity resulting from pregnancy-related complications or childbirth, or for regular prenatal care; or

iii) any period of incapacity or treatment for incapacities that result from a chronic serious health condition. A chronic serious health condition is one that requires periodic treatments, continues over an extended period of time, and may cause episodic, rather than continuing periods of incapacity (e.g., asthma, diabetes, epilepsy); or

iv) a period of incapacity that is permanent or long-term, resulting from a condition for which treatment may not be effective (e.g., Alzheimer's disease, major stroke, terminal stages of cancer). The professor or immediate family member suffering from the condition must be under the continuing supervision of a health care provider, but is not required to be receiving active treatment by the health care provider; or

v) any period of absence needed to receive multiple treatments, either for restorative surgery after an accident or injury or for a condition of incapacity (e.g., chemotherapy, physical therapy, dialysis). § 825.114.

2. **Question.** I want to take FMLA leave to care for a family member with a serious health condition. Under the FMLA, who counts as family?

Answer. Your spouse, child, parents, or those who stand "in loco parentis" count as immediate family members for the purposes of the FMLA. § 825.112(a)(3). Under the FMLA, "immediate family members" excludes your spouse's parents, your siblings, grandparents, or domestic partner. § 825.113. You may take FMLA leave to care for children only until they are eighteen years

old, unless the adult child is "incapable of self-care" because of a mental or physical impairment (e.g., severe paralysis) that substantially limits one or more of the child's "major life activities." § 825.113(c) & § 825.116. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and having the ability to find a job and hold it. The terms "physical or mental impairment," "substantially limits," and "major life activities" are further defined in regulations under the ADA [29 CFR § 1630.2(h), (i) & (j)], which were issued by the EEOC. See § 825.113(c)(2).

3. **Question.** My same-sex domestic partner has cancer. How much FMLA leave am I entitled to?

Answer. Under the FMLA, your spouse is defined as an individual who is legally recognized as your husband or wife in the state in which you live, including spouses in common-law marriages. § 825.113(a). Therefore, unless your state or municipality recognizes same-sex marriages, or mandates that employers provide FMLA benefits for committed partners in long-term relationships, you will not qualify for federal FMLA leave to care for your partner. Check your faculty handbook and, if applicable, your collective bargaining agreement to determine whether your college or university has a leave policy that would allow you to take the time you need.

4. **Question.** I recently took twelve weeks of FMLA leave following the birth of my baby. The baby is asthmatic. May I take additional FMLA leave this year to care for the baby when he is suffering from this serious health condition?

Answer. Probably not, but it depends on how the twelve-month period is defined in your faculty handbook. Your entitlement to twelve weeks of FMLA leave is on an annual basis. Within a year the "clock" will reset and you will be entitled to twelve weeks of FMLA leave annually (until your child is eighteen years old) to care for him or her. § 825.200.

But institutions define the "period of the year" differently. Under the law, employers have the choice to define "any twelve-month period" in one of four ways:

- the calendar year; or
- any fixed twelve-month "leave year," such as the fiscal or academic year, or the beginning of a professor's appointment; or
- the twelve-month period measured forward from the date your first FMLA leave begins; or
- a "rolling" twelve-month period measured backward from the date an employee uses any FMLA leave.

§ 825.200(b) Nevertheless, the administration must comply with state FMLA law, which may delineate a particular method of how to measure the twelve-month period. § 825.200(d)(2). In the end, however the "twelve-month period" is defined, that definition must be consistently applied to all FMLA-eligible employees.

How the twelve-month period is defined makes a difference. Under the first three options, it is possible to "stack" FMLA leave back to back. For instance, under the first two options, you could take twelve weeks of FMLA leave at the end of the calendar year or other fixed year, and another twelve weeks immediately thereafter at the beginning of the next year. Under the third option, the next twelve-month period starts the first time FMLA leave is taken after any previous twelve-month period is completed. Only the last option—the "rolling" method—does not permit "stacking." Under that option, each time you take FMLA leave, the remaining leave entitlement would be any balance of the twelve weeks not used during the preceding twelve months.

Check your faculty handbook and, if applicable, your collective bargaining agreement to determine if there are options other than the FMLA that would allow you to take leave to care for your sick child. For example, some institutions have sick-leave policies that allow professors to use their own sick leave to care for immediate family members who are ill or provide faculty members a preset number of personal leave days for any purpose. These types of plans might also provide you with the additional leave you need to care for your child.

5. **Question.** May I take my accumulated, paid sick leave for my own serious health condition and then up to twelve more weeks of leave as unpaid FMLA leave?

Answer. Perhaps. First, the college and university has the right *not* to agree to such a leave arrangement. Under the FMLA your institution may have a policy that requires you to utilize concurrently your accumulated paid sick leave along with unpaid FMLA leave for recovery from your own serious health condition. § 825.207(a). For example, suppose you have accumulated six weeks of sick leave and you use all of it for your serious health condition. During the time that you are on sick leave, you are paid, but since your institution requires you to take the two types of leave concurrently, you have also used up six weeks of your FMLA leave. Remember, you are still entitled to six more weeks of unpaid FMLA leave within the designated twelve-month period. Second, if your administration knows you are on sick leave for your own serious health condition, but does not also designate your sick leave as FMLA leave and notify you of this designation in writing, then the administration may not retroactively designate your sick leave as FMLA leave. § 825.208(c). It's your employer's responsibility to designate your leave as FMLA leave and to notify you if that leave will be paid or unpaid. § 825.208(a). If you take leave for an FMLA-qualifying reason and your administration didn't have sufficient information to determine if you qualified for FMLA leave, the leave you take may be designated retroactively as FMLA. § 825.208(c) & § 825.208(d).[3]

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3. The U.S. DOL's regulation 29 CFR § 825.700(a), providing that leave does not start counting toward the twelve-week FMLA period until the employer notifies the employee, was recently struck down by the U.S. Supreme Court. In *Ragsdale v. Wolverine World Wide*, 535 U.S. ___ (2002), the Supreme Court ruled that § 825.700(a) was contrary to the act, because it requires employers to provide more than twelve weeks of unpaid leave if the employer does not designate the leave as FMLA leave: "This provision punishes an employer's failure to provide timely notice of the FMLA designation by denying it any credit for leave granted before the notice." In so ruling, the Court expressed concern that the regulations'

6. **Question.** I have already used up two weeks of my accumulated paid sick leave this fiscal year for various minor illnesses (e.g., colds, ear infections, etc.) Now I must have major surgery before the end of the year, and my doctor recommends that I take twelve weeks of leave following the operation. I had assumed I could use my twelve weeks of unpaid FMLA leave for this purpose, but my dean says I have already used two weeks of FMLA leave and I may take only ten weeks following the surgery. Is this correct?

Answer. Probably not. Many college and university sick-leave policies allow for paid leave for minor as well as serious health conditions. FMLA leave, however, is permitted only for a *serious* health condition. § 825.114. Thus, the two weeks of sick leave you took earlier in the year probably do not count as FMLA leave and, therefore, you probably still have twelve weeks of FMLA leave remaining this year.

7. **Question.** My spouse had a stroke and is currently in the intensive care unit at a nearby hospital. I want to take FMLA leave for the duration of his stay in the hospital, but my department chair has denied my leave request. Although she acknowledges that a stroke counts as a serious health condition under the FMLA, the chair argues that, since my husband is in an intensive care unit, he is receiving round-the-clock medical care and consequently I am not needed in the hospital to "care for" my husband. Can the chair deny this FMLA request?"

Answer. Probably not, unless you have used up your twelve weeks of FMLA leave for the designated twelve-month period. The Department of Labor has determined that "caring for" a seriously ill family member includes physical and/or psychological care. Physical care includes such things as providing for your family member's basic hygiene and his or her nutritional needs and safety, and even taking your family member for medical appointments when he or she is unable to go alone. Psychological care is specifically defined to include providing psychological comfort and reassurance that would be beneficial to a seriously ill family member who is receiving inpatient (or home) care. § 825.116.[4]

8. **Question.** May I take FMLA leave to have elective surgery and to recuperate from the operation?

Answer. FMLA leave is available for absences from work necessitated by elective surgery and recuperation from that surgery if the elective surgery is a treatment for an FMLA-qualified "serious health condition." For example, you might have debilitating arthritis that could be managed either with pain medication and physical therapy or with surgery. If you and your doctor decide

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"severe and across-the-board penalty" would dissuade employers from providing more generous benefits than those required by the FMLA.

4. But see *Marchisheck v. San Mateo County*, 199 F.3d 1068 (9th Cir. 1999), *cert. denied*, 2000 U.S. LEXIS 3824, which held that the employer was allowed to deny a mother's FMLA leave to "care for" her child because it was unclear whether her son had a "serious health condition" and, even if he did, the reason why the mother was moving him from the U.S. to the Philippines was "to keep him safe from further beatings" not so "he could receive superior—or any—medical or psychological treatment."

that the elective surgery is the better course of action for you, you may take FMLA leave. Your department chair may ask you to have the surgery at the time that will least disrupt your classes, but if your doctor recommends scheduling the surgery at a different time, it would appear that you may take FMLA leave for the surgery and necessary recuperation period. You may not take FMLA leave for elective surgery that is not for the treatment of a serious health condition. For example, if you wanted to have elective cosmetic surgery to remove wrinkles on your face, you could not take FMLA leave for this purpose. § 825.115(c)

VI. TAKING FMLA LEAVE INTERMITTENTLY OR BY WORKING A REDUCED SCHEDULE

Under the FMLA, you are not required to take your twelve weeks' leave all at one time. You may *always* take your FMLA leave in shorter time periods if each individual time period of leave is taken for a *different* FMLA-qualifying reason. § 825.200(a). For example, you might have to use four weeks of leave at the beginning of the year because you had a heart attack. Then, a few months later, you might need to take another two weeks of FMLA leave to care for your seriously ill spouse. A few months after that you might need to take some more FMLA leave—up to six weeks—because you were in a serious automobile accident.

But the FMLA sometimes permits faculty members to take leave on an intermittent basis throughout the year for the *same* FMLA-qualifying reason. § 825.203. Under certain circumstances, you may take your twelve weeks of FMLA leave a few hours, days, or weeks at a time.

Another option is to take FMLA leave by working on a part-time schedule for a period of weeks or months, which is considered as working a "reduced schedule." Your administration must grant your intermittent or reduced-schedule leave if a health care provider determines either that this type of leave is medically necessary to best accommodate your own serious health condition or to allow you to care for an immediate family member experiencing a serious health condition. § 825.203(c). You must have your administration's permission, however, if you want to take leave on an intermittent basis, or if you want to take FMLA leave by working part time, for any other FMLA-qualifying reason, such as after birth of a child or after adopting a child. § 825.203(b).

1. **Question.** I have cancer and my chemotherapy makes me sick one week every month. May I take FMLA leave intermittently—one week at a time—following my chemotherapy treatments?

Answer. Yes, because you have a medical need that is best accommodated through an intermittent leave schedule. Intermittent leave is leave taken in separate blocks of time due to a single illness or injury. Such blocks of time can be as long in duration as you need, e.g., one hour, one day, one week, one month, etc. § 825.203. At the same time, you may be obliged to confer with your department chair in an effort to schedule the chemotherapy at a time that will not unduly disrupt the college's operations. If that is not possible, your administration may assign you temporarily to an "alternative position" for which you are qualified to better accommodate your need for intermittent leave. § 825.204. For example, if you need to be absent from work one week out of every month, you might assume an administrative position, or be assigned

nonteaching responsibilities during the semester(s) you will be on leave. Such a temporary transfer must comply with other laws, such as the ADA, and, where applicable, collective bargaining agreements, § 825.204(b), and the position must provide "equivalent pay and benefits." § 825.204(c).

2. **Question.** May I take intermittent leave or work on a reduced leave schedule following the birth of our baby?

Answer. Yes, as long as your dean or department chair agrees to such an arrangement. § 825.203(b). For example, you might want to take two weeks of FMLA leave when your wife and the baby come home from the hospital. You might also want to take some or all of the remaining ten weeks of your FMLA leave to be with the baby later during the year, for example, when your wife returns to her job outside the home. In this case you would be requesting an intermittent leave schedule. Alternatively, a faculty member who gives birth during the summer might want to teach only one course in the fall semester, instead of her normal three courses. In this case, the faculty member would be requesting FMLA leave in the form of a part-time work schedule, which would have to be agreed to by the administration.

3. **Question.** I need to take a few hours every week to drive my mother to her physical therapy treatments that are the result of a serious car accident. She cannot transport herself. May I take FMLA leave on an intermittent basis to assist her?

Answer. Yes. § 825.203(c). Again, you may have an obligation to confer with your department chair in an effort to schedule your mother's physical therapy at times that will not disrupt unduly the university's operations. Keep in mind, however, that if you can schedule your classes and your other on-campus duties so you are free one morning or afternoon a week, then you may take the time needed to care for your mother without taking any FMLA leave or interrupting your professional responsibilities on campus. Also, unless the health care provider overseeing medical treatment objects, your employer may legally ask you to schedule treatments on your nonteaching days so that the FMLA leave you take is time away from your research and/or service duties. § 825.117.

4. **Question.** May I take FMLA leave in the form of course reductions from my normal teaching schedule?

Answer. Probably. If you take FMLA leave for your own serious health condition and your health care provider determines that to facilitate your recovery you should teach part time only, then your administration is obligated to allow you to take your leave in the form you have requested. § 825.203(c) ["A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time." § 825.203(a)]. In other cases, such as following the adoption of a child, the administration must agree with your request to take FMLA leave in this form, and you must try to formulate a leave schedule that minimizes disruptions to the college's operations. § 825.203(b) & § 825.117.

For example, suppose you teach Monday, Wednesday, and Friday: two courses in the morning and two courses in the afternoon. You have requested a two-course reduction so that you will have Monday, Wednesday, and Friday mornings to take your seriously ill daughter for medical treatments. Instead, your administration could offer to switch your Monday, Wednesday, and Friday morning classes to Tuesday and Thursday. § 825.117. If you accept the new teaching schedule and are still able to perform your other nonclassroom on-campus duties, then the administration may not count the time you take to care for your sick family member as FMLA leave.

The administration may also ask you to switch your family member's medical treatments to Tuesday and Thursday so that you take your leave time away from your research and/or service duties, not your teaching responsibilities. If the health care provider caring for your family member insists on a Monday, Wednesday, and Friday treatment schedule for some reason, however, the administration must give you the leave schedule you originally requested. § 825.203(c). Also, remember that if you do not want to teach the new schedule that the administration has proposed, you still have the option to take up to twelve straight weeks of unpaid FMLA leave to care for your seriously ill family member. Your dean or department chair might prefer to give you the reduced schedule that you originally requested rather than lose your services entirely for up to twelve weeks.

Consider another example: Suppose you teach four courses per semester and you want to take FMLA leave in the form of a two-course reduction during the coming semester following the adoption of a child. Your administration may grant your request or suggest an alternative reduced work schedule if the one you proposed will cause a large disruption in your department's teaching schedule. Because faculty work generally involves much more than just teaching, the administration may respond that you should consider rescheduling your time as follows: (1) reduce your other activities (e.g., service on college committees, research, etc.) by the amount of time you normally spend teaching one course; and (2) reduce your teaching load by only one class in the coming semester.

5. **Question.** If I take leave in the form of a reduced teaching schedule, how should my administration count that leave against the twelve weeks of FMLA leave to which I am entitled?

Answer. When determining how much FMLA leave you take in a semester when working a reduced schedule, the administration must use your regular work schedule (i.e., teaching plus nonteaching duties) as the baseline for determining leave taken. If your schedule varies, the number of hours normally worked is calculated by looking at the twelve weeks prior to the beginning of the leave period. § 825.205(d). For example, suppose you normally teach three courses a semester. While certain time periods require more work than others (e.g., weeks you grade midterm or final exams), you determine that in an average week you spend three hours per course in the classroom (i.e., nine hours); two hours preparing lecture notes, writing homework assignments, and holding office hours for each hour spent in the classroom (i.e., eighteen hours); and one

hour grading papers for each one hour spent in the classroom (nine hours). Thus, on average, you spend thirty-six hours a week on teaching duties.

You also, for example, serve on several college committees (twelve hours per week) and spend twelve hours per week on your own academic research. Accordingly, your normal, baseline schedule indicates that you work sixty hours a week. If you reduce your teaching schedule by one course, you reduce your workweek by twelve hours or one-fifth. Thus, every week of the semester counts as one-fifth of a week of FMLA leave used, except for full weeks of vacation (like spring break when you use no FMLA leave). Every five weeks of the semester teaching on this reduced schedule would result in a one-week deduction from your twelve weeks of FMLA leave. Thus, if your semester is fifteen weeks long, you will use three weeks of FMLA leave working this reduced schedule. § 825.205.

6. **Question.** If I take FMLA leave by working a reduced schedule, and I am not entitled to paid leave, how much are my salary and fringe benefits reduced?

Answer. As a general rule faculty members, as salaried professionals, are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA). Because you, as a faculty member, are an "exempt" employee, the administration is not ordinarily allowed to take hourly deductions from your salary. But the FMLA permits salary deductions for any hours taken as intermittent or reduced FMLA leave within the workweek without affecting exempt status. § 825.206.

And so, your salary must be reduced on a basis that is proportional to the amount of leave time you take. § 825.206(b). For example, if you usually work sixty hours a week and take FMLA leave in the form of a one-course reduction for one semester, how much is your salary reduced? In the example in Question 5, the total amount of leave taken was three weeks.

Example 1—The 9-Month Contract. Suppose you are on a 9-month contract (e.g., 36 weeks) and suppose you are paid $42,000 per year. Divide $42,000 (the annual salary) by 36 weeks to calculate your weekly salary: $42,000 ÷ 36 = $1,166.67. Now since your reduced schedule results in 3 full weeks of FMLA leave, multiply 3 weeks by the weekly salary of $1,166.67, which equals: 3 x $1,166.67 = $3,500 reduction in annual pay.

Example 2—The 12-Month Contract. If you are on a 12-month contract, divide the annual salary by 52 weeks to determine the weekly salary: $42,000 ÷ 52 = $807.69. The pay reduction would then be calculated by multiplying the 3 weeks of FMLA leave by the weekly salary: 3 x $807.69 = $2,423.08 reduction in annual pay.

Some institutions have *personal* leave policies that allow faculty members to reduce their course loads by one or more courses with pay reductions that are much larger than those permitted under the FMLA. For example, at a college where the usual course load is six courses per year, the administration might require a full-time professor to reduce his salary by one-sixth for each one-course reduction when he takes personal (not FMLA) leave. Using the facts and salaries in the first example above, that would result in an annual pay reduction of $7,000—double the pay reduction under the FMLA example. At a university where the normal course load is four courses per year, the administration might

require a full-time professor to reduce her salary by one-fourth for each one-course reduction. If your college or university has a personal leave plan such as the ones described above, you should explore whether that personal leave policy or FMLA leave best meets your needs.

Alternatively, some colleges and universities allow a faculty member to take personal leaves in the form of course reductions, but then the administration reduces the full-time faculty member's salary by the amount of money the college spends to find a replacement to teach the course(s) of the faculty member on leave. For example, if it costs the school $500 in search costs and $3,500 in salary to hire a replacement faculty member, the faculty member who takes personal (not FMLA) leave in the form of a one-course reduction in teaching load has his salary reduced by a total of $4,000.

Both of these types of formulas should not apply to professors who take FMLA leave, because the personal leave and "replacement" formulas described above require the professor to take a larger pay reduction than that permitted by the FMLA. Your institution must compensate you for teaching and nonteaching duties as well. Your institution may elect to provide through its own policies more generous family and medical leave benefits than those established by the FMLA, but it may not offer a family and medical leave benefit less generous than that available under the FMLA. § 825.700(a).

The institution may not eliminate benefits that would normally be provided to part-time employees when you switch to a reduced schedule.

However, any benefits, including health insurance, that are provided to faculty members based on the number of hours worked may be reduced proportionately if you take FMLA leave by working on a part-time basis. § 825.204(c). So, if you normally accrue eight hours of paid sick leave per month of employment, and you took FMLA leave by working half time, then you would accrue only four hours of paid sick leave per month while you are on a reduced-schedule leave.

7. **Question.** If I take FMLA leave on an intermittent basis, and I am not entitled to paid leave, how much are my salary and benefits reduced?

Answer. Your salary may be reduced on a basis that is proportional to the amount of leave time you actually take. § 825.206(b). For example, suppose you must miss one full week of work out of every four weeks for an FMLA-qualifying reason (e.g., to care for your parent after her chemotherapy treatments). Also, suppose you are on a 9-month (i.e., 36 week) contract, and earn $48,000 a year. Divide your salary by 36 weeks to calculate your weekly salary: $48,000 ÷ 36 = $1,333.33. For each week of work that you miss during the academic year to take FMLA leave, your salary may be reduced by $1,333.33.

If instead you are on a 12-month contract, divide your annual salary of $48,000 by 52 weeks: $48,000 ÷ 52 = $923.08. In this case, for each week of work that you miss during the academic year for FMLA leave, your salary should be reduced by $923.08. Leave that you take during a full week of spring break, full weeks of winter break, or full weeks of summer break for an FMLA-qualifying reason should probably not result in a reduction in your pay (or in a credit against your FMLA leave) *if* your college or university does not have classes

scheduled during those breaks and/or if faculty are normally not required to report to the office for duty during those breaks. § 825.200(f).

While the FMLA permits salary deductions for any hours taken within the workweek as intermittent or reduced-schedule leave, if your institution has more generous family medical leave benefits, then the more generous institutional policy must apply. § 825.700. Therefore, if your institution already permits faculty to take days off *with pay* for family or personal medical treatments, then you are entitled to do the same.

If you take intermittent leave, all benefits, including health insurance, normally provided to full-time appointments must also be available while you take FMLA leave. However, any benefits that are provided to you based on the number of hours worked may be reduced proportionately. § 825.204(c). So, in the above example, if you normally accrue eight hours of paid sick leave per month of your appointment, then you would accrue only six hours of paid sick leave per month while on intermittent leave.

8. Question. I need to take FMLA leave by working a part-time (or intermittent) schedule. Can my department chair transfer me from my full-time teaching position to an administrative position during the period I will be on leave?

Answer. If the administration is concerned that your proposed leave schedule would be too disruptive to students enrolled in your courses (or to some other aspect of your normal work schedule), then you may be assigned to an "alternative position" that would better accommodate your leave. § 825.204. The equivalent position need not have equivalent duties, although it must have equivalent pay and benefits. For example, if you take reduced-schedule leave by reducing your normal course load from four courses a semester to two courses, you are working as a part-time faculty member. However, your institution may not pay you its adjunct faculty rates for teaching your remaining courses but must pay you the same "hourly rate" as you would normally earn (if you computed your salary on an hourly basis). § 825.204(c).

In selecting an alternative position for you, the administration must consider several FMLA mandates. First, it may not assign you to an alternative position for which you are not qualified. § 825.204(a). For example, if you are a chemistry professor, you may not be assigned to teach on a reduced schedule in the physics department, which happens to be short of faculty. Nor may you be assigned to administrative positions for which you are not qualified. For example, a sociology professor may not be assigned to be a reference librarian.

Your administration also may not transfer you to an alternative position in order to "discourage" you from taking leave or retaliate against you for taking such leave. § 825.204(d). For example, you probably cannot be assigned to assist the secretary in the academic dean's office or to help the custodians in buildings and grounds. If you work for a state university with several campuses, you probably cannot be assigned to teach courses at a distant campus. Arguably, a teaching schedule upon your return from FMLA leave that is unusual or inappropriate given your expertise and the practice in your department might raise the issue of whether you are being "punished" for exercising your FMLA rights.

If the alternative position better accommodates your need for a reduced-schedule (or intermittent) leave, does not cause an undue hardship for you, and is a position for which you are qualified with equivalent pay and benefits, then you do not have the right to refuse this position in favor of some other alternative position that may be more to your liking. § 825.204.

If your "serious health condition" (under the FMLA) also qualifies as a "disability" (under the ADA), then your institution may be required to provide a reasonable accommodation that will allow you to keep your original position. § 825.204(b). For example, suppose you have a heart attack that leaves you with an ADA-qualified disability. You need to work a part-time schedule and your physician has recommended you reduce your teaching load from five classes per year to four classes. In this case, rather than transfer you to an administrative position (under the FMLA) your administration might make a reasonable accommodation for your disability by allowing you to teach two classes per semester and hiring a qualified adjunct faculty member to teach the fifth class that you would have taught, if not for the disability.

Also note that if your employer proposes an alternative position (or reasonable accommodation) that complies with the law, but is one that you find undesirable, you still have the right to take your FMLA leave in a single block of time. For example, following the birth or adoption of your child, you may desire to take your FMLA leave by working part time. If your employer proposes that you switch to an administrative position that you find undesirable during the time you will be on leave, you may still elect to take up to the twelve weeks of your FMLA leave in a single block. Because twelve-week leaves don't fit neatly into semesters, sometimes, rather than lose your services for a twelve-week time period, your institution may try to find you a different alternative position that you do find desirable.

VII. WHEN IS FMLA LEAVE PAID?

The FMLA requires covered employers to provide only *unpaid* leave to their FMLA-qualified employees who take leave for FMLA-qualifying reasons. The interaction between the FMLA and various benefits policies, however, sometimes creates situations where professors may take FMLA leave with pay.

1. Question. May I use my accumulated paid sick leave and/or annual leave to take paid FMLA leave for my own serious health condition?

Answer. Yes. You may always choose, or your institution may require, that you take your accumulated paid sick leave and/or vacation concurrently with your unpaid FMLA leave, assuming that you qualify for leave for your serious health condition under your institution's sick-leave plan. § 825.207. For example, suppose you work at a university where you accumulate one day of paid sick leave and one day of paid vacation leave for each month of appointment. Suppose after you have accumulated twenty-five days of sick leave and twenty-five days of vacation leave, you develop a serious health condition for which you need to take FMLA leave. Based on the above, you may take up to the first ten weeks of FMLA leave as paid leave (combining your accrued sick and vacation leave). If you need additional time off after those ten weeks, you may take an additional two weeks of unpaid FMLA leave. But please note that

"[a]n employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave 'in any situation' where the employer's uniform policy would not normally allow such paid leave." § 825.207(c). For example, if you want to take FMLA leave to care for your seriously ill child, you may not use your own sick leave to take paid FMLA leave if your school does not normally allow employees to use their own sick leave to care for ill family members.

2. **Question.** When may I use my paid sick leave to subsidize my FMLA leave to care for a seriously ill family member?

Answer. It depends. Check your faculty handbook and, if applicable, your collective bargaining agreement. Some institutions allow you to use your accumulated sick leave *only* for your own illnesses. Other policies allow you to use some or all of your accumulated sick leave to care for an immediate family member who is ill. If your institution falls into this latter group, you may elect, or your institution may require, that you use your paid sick leave concurrently with your FMLA leave in order to take FMLA leave on a paid basis. § 825.207(c).

If you teach at an institution where you accumulate paid, personal, or vacation leave, you may elect, or your institution may require, that you use this leave concurrently with your FMLA leave to take paid leave to care for your seriously ill family member. For example, if your institution does not allow you to use your own sick leave to care for an ill family member, but you have accumulated fifteen days of paid vacation leave, then you may choose to use those days to "pay for" up to three weeks of FMLA leave. If you need more than three weeks of leave to care for your seriously ill family member, you will probably have to take any or all of the remaining nine weeks of FMLA leave as unpaid leave.

Your institution is not required to give you any more paid leave than you have previously accumulated in order for you to take paid FMLA leave. However, some universities have "sick-leave banks" where faculty members who have not used all their accumulated sick or vacation leave may donate unused leave for others who have exhausted their accumulations. Check your letter of appointment, faculty handbook, and, if applicable, collective bargaining agreement to determine if your institution offers such a policy.

VIII. Medical Certification Requirements

Under some circumstances your institution may require you to submit a medical certification before giving final approval for your FMLA leave. A medical certification form is provided by the U.S. Department of Labor at <www.dol.gov/dol/esa/public/forms/whd/index.htm>.

1. **Question.** Under the FMLA, must I provide medical documentation to my college or university that I have a serious health condition?

Answer. Your institution may require you to provide a medical certification to take FMLA leave for your own serious health condition or to care for an immediate family member who is seriously ill. § 825.305. Check your faculty handbook or contact your campus Office of Human Resources to determine whether your institution requires such certification. No medical

certification is required if you are taking FMLA leave for the placement in your home of an adopted or foster care child, or for the birth of your own child.

2. Question. What information must be included in the medical certification to my institution?

Answer. The U.S. Department of Labor created form WH-380, which lists all the information that your health care provider must provide to your college or university. Alternatively, your health care provider can include the necessary information in a letter or memorandum to your institution. If your institution requires medical certification, your health care provider must provide the following information:

- your health care provider's name and type of medical practice (including medical specialty, if any);
- the date that the serious health condition began;
- the serious health condition's likely duration;
- a statement that you are unable to perform one or more of the essential functions of your job (if you are the one who is seriously ill);
- medical facts that support the certification that you or your immediate family member has a serious health condition;
- whether you will need to take intermittent or reduced-schedule leave; and
- a verification that your presence is needed to care for an immediate family member with a serious health condition; and the expected amount of time during which your presence will be needed. § 825.306.

If your college's sick- or medical-leave plan requires less information in its medical certifications, and you are substituting paid sick, vacation, personal, or family leave for the unpaid FMLA leave, where feasible (§ 825.207), then only the institution's "lesser sick leave certification may be imposed." § 825.306(c).

3. Question. I am taking FMLA leave for my own serious health condition and, following my college's policy, I submitted a medical certification. The day after I turned in the certification, the dean called saying that I need to send the director of human resources all medical records related to my current illness. Must I make all my medical records available to the institution?

Answer. No. If you have submitted a complete medical certification, signed by your health care provider, your institution may not ask for additional information (including your medical records) from your health care provider. However, a health care provider representing your institution may contact your health care provider (with your permission) in order to *clarify* information already included in the medical certification. § 825.307(a).

4. Question. I was in a serious car accident. When does my FMLA leave begin and how soon do I have to provide the medical certification to my institution?

Answer. FMLA leave begins on the first day that you miss work because of the accident. For example, if you have an accident on the first day of winter break, your FMLA leave wouldn't begin until you are expected to be back at the office (e.g., for registration) or in the classroom. If your accident happens on a Monday morning on your way to teach your first class of the week, your FMLA leave would begin on the date of the accident. Once the institution learns from you or your spokesperson that you are taking leave for an FMLA-qualifying reason, the institution may seek a medical certification of your condition. If the institution asks for medical certification, you have fifteen days within which to provide it, unless this is not possible because of your medical circumstances. § 825.305(b).

5. **Question.** The director of human resources at my university has my doctor's certification of my illness. She wants me to get a second opinion from the doctor at the university's campus health center. Must I comply with the administration's request for a second opinion?

Answer. The director has the right to require a second opinion after reviewing your health care provider's medical certification. § 825.307(a)(2). If you go to another doctor for a second opinion at the administration's request, your college or university must pay all costs associated with obtaining the second opinion. § 825.307(a)(2). Not only must it pay the health care provider, but it must also reimburse you for all "out-of-pocket" travel expenses (e.g., cab fare, parking, gas, tolls, etc.) that you incur to obtain that second opinion. § 825.307(e). Your institution may select the health care professional to provide the second opinion, subject to the constraint that the college or university does not employ the provider on a regular basis or regularly contract for the services of that provider. § 825.307(a)(2) & (b).

6. **Question.** The opinion of my doctor was different from the second opinion provided by the doctor the administration selected. How do we settle the dispute? Am I entitled to FMLA leave during its resolution?

Answer. You and the administration must jointly select a qualified health care professional to provide the third opinion. The opinion of this third provider will be final. § 825.307(c). Your institution must pay all costs associated with obtaining a third opinion, including medical bills and out-of-pocket travel expenses. § 825.307(c) & (e).

In the time period between when you submit your original medical certification and when the second and third opinions are collected, you are "provisionally entitled" to all FMLA benefits. § 825.307(a)(2). If the final opinion does not support your claim, however, any leave time you took will not be counted as FMLA leave, and it is up to your administration's discretion to redesignate the leave time you used under the institution's existing leave policies. § 825.307(a)(2).

7. **Question.** Are medical doctors the only health care professionals allowed to provide medical certifications under the FMLA?

Answer. No. Many medical professionals besides doctors of medicine are defined to be "qualified health care providers" under the FMLA. § 825.118. These professionals include, but are not limited to, doctors of osteopathy, podiatrists, dentists, clinical psychologists, optometrists, nurse practitioners, and certified nurse midwives. To be a "qualified health care provider," they must be licensed to practice by a state and be performing within the scope of their practice when they care for you or your immediate family member. § 825.118.

8. Question. I am having nonemergency surgery and I was unable to provide notice until twenty days before the scheduled date of surgery. My college's human resources director insists that I cannot begin my FMLA leave until thirty days after I provide the notification. Must I delay my surgery so I can take FMLA leave?

Answer. Probably. Foreseeable FMLA leave usually requires that you provide at least thirty days' notice. However, you are not required to provide thirty days' notice when situations arise where it is "not practicable" to provide such notice. Those situations include where there is a lack of knowledge about when the leave will be required to begin, a change in circumstances, or a medical emergency. In these cases, notice of the need for leave must be given "as soon as practicable"—generally within one to two business days of when you learn of the need for leave. § 825.302(a) & (b).

Generally, when planning medical treatments (including surgery), you must consult with the appropriate person in your administration, such as your department chair or human resources director, to make a reasonable effort to schedule the leave so as not to cause an undue disruption to the college's operations. § 825.302(e). Moreover, you may also wish to minimize the disruption to your students. The treatment plan resulting from this consultation is subject to the approval of your health care provider. So, for example, if your department chair wants you to reschedule your leave until the end of the semester, but your health care provider believes rescheduling surgery is undesirable, the health care provider makes the final decision.

9. Question. I am currently on FMLA leave for my own serious health condition. Can my institution require that I get a medical release saying I am "fit for duty" before I return to my position?

Answer. Yes. Your institution's administration may request a certification from your health care provider that you are able to return to work if you took full-time (not intermittent or reduced-schedule) FMLA leave for your own serious health condition. § 825.310. At the same time, however, the administration cannot require "fitness for duty" reports in an inconsistent manner. For example, it may not require them of women returning from leave after childbirth, but not require them from faculty members suffering other non-pregnancy-related serious health conditions. In addition, the fitness-for-duty report must be job-related and limited to the particular health condition that triggered your initial need for FMLA leave. § 825.310(b) & (c). The administration may not require a general statement or assessment of your physical health. § 825.310(c). Unlike the second or third medical opinions, the cost of this

certification and the related out-of-pocket expenses are borne by the faculty member, not by the institution. § 825.310(d).

If your serious health condition also qualifies as a disability under the ADA, your institution may in some circumstances insist that you have a medical exam before returning to work. However, your institution may not ask you to have a complete physical exam. Instead, the exam must be specific, focusing only on the aspects of your physical condition that determine whether or not you can perform the essential functions of your job (with a reasonable accommodation if necessary).

10. Question. I provided to my college a medical certification of my serious health condition. Two weeks into my FMLA leave, the administration wants a recertification of my condition. Must I comply?

Answer. Maybe. There are three circumstances under which your institution may seek recertification of your serious health condition. It may ask for a recertification no more than once every thirty days while you are on leave *unless*: (1) you ask for an extension of your initial leave period; (2) a change in circumstances affects your illness or injury; or (3) the administration obtains some information that casts doubt on the continuing validity of the most recent certification. § 825.308(c).

IX. JOB PROTECTION WHEN YOU TAKE FMLA LEAVE

With a few exceptions, the FMLA guarantees that your institution must return you to your position at the end of your leave. If your appointment has been filled or if it has been restructured to accommodate your leave, then you are entitled to another job with equivalent pay, benefits, and working conditions. § 825.214–215. Given the seasonal nature of the academic job market, it is often difficult to replace a full-time faculty member who unexpectedly takes FMLA leave during the academic year. Accordingly, job restoration tends to be less of an issue for faculty members than for other types of employees.

1. Question. Are there any limitations to my administration's obligations to restore me to my appointment?

Answer. Yes. If at the end of your leave you are unable to perform all of the essential functions of your position, then your administration is not obligated by the FMLA to restore you to the same or an equivalent position. (However, if your serious health condition has caused a disability or is associated with a disability as defined by the Americans with Disabilities Act, you may be entitled to job-protection and other benefits under that law. See Section XIII of this guide.)

Of course, an additional wrinkle for professors is that insisting on a return to teaching your class midsemester might not be the best decision for your students or your colleagues. As noted earlier, you and the administration might agree to reassign you to undertake administrative responsibilities or to give you a research assignment for the rest of the term upon your return from leave.

Additionally, you have no more right to your position than if you continued your appointment rather than having taken leave. § 825.216. For example, if your

three-year appointment to teach geology expires, you are not entitled to keep your appointment just because you were on FMLA leave. In an effort to prevent the fabrication of pretextual reasons not to restore faculty members to their former positions, the FMLA requires that the administration establish that the faculty member's position would have been eliminated irrespective of the FMLA leave.

2. **Question.** My department chair says that upon my return from FMLA leave, I must teach large undergraduate classes that meet in the evenings, rather than the small graduate seminars that I usually teach during the day. Can she require me to do so?

Answer. It depends. Retaliation is generally prohibited under the FMLA. § 825.220. The FMLA provides that "[t]he employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule." § 825.215(e)(2). The issue is whether a change in course and time would be retaliatory or constitute an "equivalent work schedule." You need to examine whether the change in course assignments upon your return from FMLA leave is unusual, inappropriate, or punitive in some way.

For example, suppose you were originally appointed as assistant professor of accounting in the college of business with responsibility for teaching two sections of accounting each semester to MBA students. Upon return from FMLA leave your dean probably may not restore you to a position as an assistant professor in the economics department.

3. **Question.** I missed teaching two courses while on FMLA leave last spring. My department chair says I must teach one extra course during the fall and spring semesters of the coming academic year to "make up" those courses. Is that true?

Answer. Probably not. Such a policy seems to violate the FMLA provision that prohibits retaliation against those who have exercised their FMLA rights. § 825.220.

4. **Question.** I anticipate returning from FMLA leave a few weeks before the end of the semester. My department chair says I have to stay out on unpaid leave until the semester is over and then return to my appointment next semester. Must I take more FMLA leave than I requested?

Answer. No. Although special rules exist for employees of "local educational agencies" when they plan to take leave near the end of the academic term, those rules apply only to "public school boards and elementary and secondary schools" as well as "private elementary and secondary schools," not "colleges and universities." § 825.600(a). Assuming you are fit to work, the college must allow you to return to your previous position (if it still exists) or to an equivalent position at the point in time when you want to return from leave. § 825.214(a)

According to Section 825.214(a), "An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has

been restructured to accommodate the employee's absence." The administration might not have to return you to the classroom, however, if doing so would be disruptive to the teaching schedule, or if someone else is being paid to teach your classes. For example, the administration could pay your regular compensation, but ask you to do full-time research and service work for the remainder of the semester.

5. Question. I am the academic dean at my university, and I need to take FMLA leave. May I assume my responsibilities upon my return from leave?

Answer. Maybe. "Key employees" are not automatically entitled to restoration to their previous positions after taking FMLA leave. You are a "key employee" of your university if your salary is "among the highest paid 10 percent" of all who work for the university. § 825.217. Since academic deans tend to earn high salaries, you may fall within the key employee category.

If you are a key employee, the administration is not required to restore you to your prior position (or an equivalent one) if such restoration would cause a "substantial and grievous economic injury" to the university's operations. Whether your absence would cause such an injury may not be considered. § 825.218(a).

If the administration determines that it will experience a substantial and grievous economic injury as a result of your return from leave, it must notify you right away that reinstatement will be denied. This notice should normally be provided before you go out on FMLA leave. If you do not receive such notice until after you have begun the FMLA leave, however, then you must be given the option of immediately returning to your position. § 825.219(b). The institution must maintain your group health insurance benefits during the period of your leave—even if you are not to be restored to your prior position. If you are denied reinstatement because you are a key employee, the institution may not ask you to repay it for the cost of your health insurance premiums while you were out on leave. § 825.219(c).

It is possible that a few faculty members might fall within the highest-paid 10 percent of employees at a university. However, it would appear difficult for an administration to demonstrate that a "key" professor's reinstatement after an FMLA leave would cause substantial and grievous economic injury to the institution. In addition, these few professors would most likely be protected by tenure. As a result, although it is possible to conceptualize the "key employee" restriction applying to, for instance, the top chef at a restaurant or a comptroller of a large corporation, it seems unlikely that faculty will often be affected by the restriction.

As one commentator noted,

> It is expected that universities will rarely, if ever, be able to demonstrate the degree of economic injury necessary to deny reinstatement to employment, particularly when such injury must be caused by the reinstatement of the "key employee," not by his or her absence during the FMLA leave. Accordingly, universities should carefully consider whether

it even makes any sense to include a "key employee" exception in their FMLA policy.[5]

6. Question. My department chair says I am able to take FMLA leave only if I can find a replacement to teach my courses. Is that correct?

Answer. Probably not. The institution may not condition your taking FMLA leave on your finding a replacement to teach your classes because that would constitute "interfering with" the exercise of your FMLA rights. If your need for leave is foreseeable and service is part of your job duties, however, you may be asked to serve on a college search committee to find your replacement. Requiring you to find your own replacement as a condition for granting your leave would probably be considered as impermissible interference with your attempts to exercise your FMLA rights. § 825.220(b). At the same time, you may wish to be involved in the selection of your replacement, if feasible and appropriate, to ensure a smooth transition for your students and colleagues.

X. THE FMLA AND BENEFITS

If you take FMLA leave, the law requires that the institution continue to provide some, but not all of, the benefits normally provided to college and university faculty members. § 825.209.

1. Question. If the faculty receives a salary increase and I am on FMLA leave, am I also entitled to that raise?

Answer. Probably. Unless your state law or institutional policy provides otherwise, FMLA is unpaid leave, and you are not entitled to pay during the leave. But upon your return, you are entitled to any unconditional pay increases that may have been authorized during the FMLA leave, such as a cost-of-living adjustment granted to all faculty members. § 825.214 & § 825.215. Similarly, if you are denied merit pay solely on the grounds that you took FMLA leave, that would appear to violate the law. If, however, you do not receive a merit pay increase because your leave interfered with your ability to be awarded such merit pay (e.g., for research, publications, presentations, or service), you would not be entitled to such discretionary pay upon your return.

2. Question. What happens to my health insurance benefits while I am out on FMLA leave?

Answer. The coverage you receive must be at the same level and under the same conditions that you would have received had you not taken leave. § 825.209. For example, if the administration normally pays 100 percent of your health insurance premium, it must continue to pay 100 percent of your health insurance premium while you are on FMLA leave. If the administration normally provides only 50 percent of your monthly health insurance premium, it is not required to pay more than this amount while you are on FMLA leave. You are

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5. Thomas J. Flygare, *The Family and Medical Leave Act of 1993: Applications in Higher Education*, 2nd ed. (Washington, D.C.: National Association of College and University Attorneys, 1995), pp. 22-23.

responsible for the amount of the premium you normally pay, even if you are on *unpaid* FMLA leave.

3. Question. I took twelve weeks of FMLA leave, and forgot to send in my check for the portion of my health insurance premium by the due date provided by the administration. Will my health insurance be canceled? If it is canceled, can it be reinstated when I return to work?

Answer. Maybe. If your college does not pay 100 percent of your health insurance premium, the institution may cancel your health insurance coverage if your premium portion is more than thirty days late. If your coverage stopped during the leave period because you failed to make the premium portion payments, then the administration must restore you to full group health coverage upon your return to work. In this case you must be restored to the same level of coverage and benefits that you would have had if you had not taken FMLA leave. Consequently, you may not be required to meet any qualifications imposed by your health insurer, including any waiting period for a new or "pre-existing condition." The institution may not require you to wait for an "open season" to re-enroll or to pass a medical examination to obtain coverage. § 825.212. Accordingly, at least in practice, it may make the most sense for colleges and universities to continue your coverage, despite your failure to pay the required portion of your health insurance premium, rather than expend the effort to re-enroll you in the benefit program.

If you failed to pay your premiums during FMLA leave, and *if* your administration continued to pay your share of your health insurance premiums while you were on leave, then your college may demand that you repay it for your share of the health insurance premiums that you did not pay while you were on leave. § 825.212(b).

4. Question. My college and I split 50–50 the premiums for my health insurance. May the administration stop paying its share of my health insurance premiums while I am on FMLA leave?

Answer. Generally not. But if your premium payment is more than thirty days late, the administration may discontinue your health insurance coverage, although it must mail you a letter notifying you of this fact at least fifteen days before the date that coverage will cease. § 825.212. Also, if you choose not to return to work following your FMLA leave, the administration may cease paying its share of your health insurance premiums on the date that your FMLA leave ends. In addition, if your appointment would have ended at some point during your leave (e.g., due to non-renewal of your contract for reasons not related to your FMLA leave), the administration may cease paying its share of your health insurance premium at that point. § 825.209(f), § 825.211(e), & § 825.213.

5. Question. I took FMLA leave at the end of the spring semester. While out on leave, I accepted a job at another college. Can the college where I was originally appointed when I applied for FMLA leave demand that I reimburse it for its share of my health insurance premiums that it paid while I was out on leave?

Answer. Maybe. If you accepted the job at another college because you were at the end of a multi-year contract that the first institution did not intend to renew, then it may not demand that you reimburse it for health insurance premiums it paid on your behalf. In this case your failure to return to work was not caused by your actions. § 825.213(a)(2). However, an institution may seek repayment of those health insurance premiums it paid on your behalf if you do not return to work following your leave because of some reason within your control. So, for example, if you received and accepted a job offer from another college, even if you could have returned to your prior position, then the institution may demand that you repay it for health insurance premiums it made on your behalf while you were out on FMLA leave. § 825.213(a) & (f).

6. **Question.** If my serious health condition proves more severe than originally anticipated and I cannot return to work after my FMLA leave expires, must I reimburse the institution for the share of my health insurance premiums that it paid while I was on FMLA leave?

Answer. No. If you cannot return to work because of the continuation, recurrence, or even the onset of another serious health condition, or for some other circumstance beyond your control, the institution may not require you to reimburse its share of your health insurance premiums. § 825.213(a)(3).

7. **Question.** I took twelve weeks of FMLA leave to care for my seriously ill mother. Before I was able to return to teaching, my spouse got a new job in a different state and I am moving with him. Am I obligated to reimburse the institution for the portion of my health insurance premiums that it paid while I was on FMLA leave?

Answer. No, not if your spouse is taking a job more than seventy-five miles from your campus, because that is considered a circumstance "beyond the employee's control" under the FMLA regulations. § 825.213(a)(2).

8. **Question.** I took twelve weeks of FMLA leave in the spring semester to care for my newborn baby. Then I returned to work for five weeks during summer term. Because my wife earns enough to support our family, I have decided not to work for several years so I can stay home with my child. Am I obligated to reimburse the institution for the portion of my health insurance premiums that it paid while I was on FMLA leave?

Answer. No. If you return to work for more than thirty calendar (not business) days following your FMLA leave, the institution cannot ask you to reimburse its share of your health insurance premiums. § 825.213(c).

9. **Question.** Am I entitled to other fringe benefits besides health insurance while I am on FMLA leave?

Answer. No, not under the FMLA. You should review your letter of appointment, faculty handbook, and, if applicable, collective bargaining agreement to determine your institution's policy for providing fringe benefits

when faculty are on various types of paid or unpaid leaves of absence that might run concurrently with your FMLA leave. § 825.209(h). For example, if faculty on medical leave are allowed to count the time they are on leave as time served toward determining the date of their next sabbatical, and if you take unpaid FMLA leave and paid medical leave concurrently for your own serious health condition, you should be entitled to count your leave time toward determining the date of your next sabbatical. Or, for example, suppose you take a reduced-schedule FMLA leave by working part time. If your faculty handbook provides that professors working at least half time are entitled to the college's full range of benefits, then you, too, are entitled to the full range of fringe benefits (e.g., life insurance, long-term disability insurance, tuition benefits for a spouse or children, etc.) during the period you are on FMLA leave.

Taking FMLA leave should not cause you to lose benefits upon your return to work that you were entitled to before you went out on leave. If the package of benefits awarded to faculty either increases or decreases while you are on FMLA leave, however, you are entitled to that increase or subject to that decrease as well. § 825.209.

When you return to work your benefits (e.g., health insurance, disability insurance, and so on) must be resumed with no new qualification period, physical exam, or the like. Consequently, in some cases your institution may elect to maintain other benefits (e.g., life and disability insurance) for you by continuing to pay the premiums while you are on FMLA leave. For example, suppose you need to take FMLA leave for your own serious health condition. It is possible that the nature of your serious health condition would leave you unable to obtain life or disability insurance under your institution's plan, if your coverage were allowed to lapse while you were on leave. So your human resources department may decide to pay the premiums necessary to keep these policies in force during your leave. This way your institution can comply with its obligation to provide you with all the benefits you are entitled to when you return to work. Your institution doesn't need your permission to continue paying these premiums. And in such cases, your institution may even ask you to repay it for your share of the premiums that were paid out during your period of leave. § 825.213(b).

Accordingly, many institutions choose to continue a professor's life and disability insurance coverage during FMLA leave.

10. Question. I am four years into my pretenure probationary period. What will happen to the time I have already accumulated on my tenure clock (i.e., to my seniority) while I am on FMLA leave? Must I count my time on leave as part of my probationary period?

Answer. The FMLA, by itself, neither requires nor prohibits the counting of the time you are on FMLA leave as time on your tenure clock. § 825.209(h). Section 825.215(d)(2) provides that "[a]n employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave." In the end, the answer to this question lies in the interaction between the FMLA and the benefits delineated in your letter of appointment, faculty handbook, and, if applicable, collective bargaining agreement. You should be allowed to choose whether or not to count time you are on FMLA leave toward your probationary

period. The choice should be at the option of the professor. However, the concept of adjusting the probationary period for a few weeks is somewhat artificial in academe given the nature of the academic calendar.

Perhaps more helpful is to check your institution's policy on "stopping the tenure clock." Many colleges and universities enable a professor to stop the tenure clock for a set period of time, usually a semester or year, at the option of the faculty member, following the birth or adoption of a child when you are the primary or co-equal caregiver.[6]

XI. Interaction between the FMLA and Letters of Appointment, Faculty Handbooks, and, If Applicable, Collective Bargaining Agreements

The FMLA provides a minimum level of benefits; institutions may, however, offer more generous benefits.

1. **Question.** Our collective bargaining agreement (CBA) provides me with up to six months of fully paid medical leave upon my first day of employment with the university. May the institution refuse to pay me during my medical leave and shorten my leave period from six months (twenty-six weeks) to twelve weeks under the FMLA?

Answer. No. The FMLA does not diminish your university's contractual obligation to comply with any benefit plan or CBA that provides more generous family and medical leave benefits than the FMLA provides. § 825.700. However, the institution may require the paid leave to run simultaneously with the FMLA leave so that the professor is not necessarily entitled to six months of paid leave and twelve weeks of unpaid leave, unless the CBA provides otherwise.

2. **Question.** My college provides paid short-term disability leave that I am taking for my own serious health condition. I expect to return to work before I have taken twelve weeks of leave. My college's human resources director says that, because I am taking paid leave under the college's plan, I am not entitled to job protection under the FMLA. Is this so?

Answer. No. Your institution may not diminish any of your rights under the FMLA by offering in trade some other more generous benefit. You qualify for FMLA benefits if your institution is an FMLA-covered employer, if you are an FMLA-eligible employee, if you are taking leave for an FMLA qualifying reason, and if you have satisfied FMLA notification requirements. You do not have to make a specific request for FMLA leave to receive FMLA protections. As long as the reason you give for seeking leave is an FMLA-qualifying reason, your institution is obliged to designate your leave as FMLA leave and to provide you with all FMLA-mandated benefits. § 825.208(a). If you want to ensure that you have the protections of the FMLA while you are on medical leave for an FMLA-qualifying reason, be sure to write a letter to your human resources director stating that you intend to exercise your option to take your college's short-term disability leave concurrently with your FMLA leave. § 825.208(a).

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6. For a general discussion of the topic, see AAUP, *Statement of Principles on Family Responsibilities and Academic Work* (November 2001) at <www.aaup.org>.

3. **Question.** I am pregnant. The human resources director says that if I want to use the college's short-term disability policy, I must "waive" my rights under the FMLA. Is that true?

Answer. No. Regulation § 825.220(d) provides: "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees . . . cannot 'trade off' the right to take FMLA leave against some other benefit offered by the employer."[7]

4. **Question.** I am pregnant. When I spoke to my department chair about maternity leave, he said I could take the college's standard six weeks of paid maternity leave following the birth of the baby or I could take twelve weeks of unpaid FMLA leave. Is this legal?

Answer. No. You may not be forced to trade off your FMLA rights for other types of benefits. § 825.700(a). If your college has a medical leave policy that would allow you to take up to six weeks of paid maternity leave following the birth of your child, you are still entitled to up to twelve weeks of unpaid FMLA leave. The administration may, however, require that you take the first six weeks of your unpaid FMLA leave concurrently with your *paid* medical leave. § 825.207. Under the federal FMLA regulations, paid "[d]isability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA." § 825.207(d)(1). Some state laws may provide otherwise. In this case, then, the first six weeks of your FMLA leave would be paid under your medical leave policy, and the last six weeks of your FMLA leave would be unpaid.

XII. Interaction between the FMLA and State Family and Medical Leave Laws

Many states have a variety of family and/or medical leave laws that modify and increase the benefits available to professors under the federal FMLA.

1. **Question.** My state law provides that employees are entitled to sixteen weeks of unpaid family and medical leave. May I take sixteen weeks of leave, instead of the twelve weeks mandated under federal law?

Answer. Yes. The federal FMLA sets a minimum level of benefits available to those who take family and medical leave, but you may take advantage of your state's more generous family and medical leave law. § 825.701. For example, the District of Columbia mandates that eligible employees are entitled to sixteen weeks of family leave and sixteen weeks of medical leave over a twenty-four-month period.[8]

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7. See, e.g., *Thornton v. BASF*, 2000 U.S. App. LEXIS 15909 (4th Cir. 2000); *Bluitt v. Eval Company of America*, 3 F. Supp. 2d 761 (S.D. Tex. 1998).

8. For a listing of states that offer their own FMLA laws, see <www.nationalpartnership.org/workandfamily/fmleave/statelaw.htm>.

XIII. INTERACTION BETWEEN THE ADA AND THE FMLA

The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 prohibit discrimination against individuals with an actual, with a record of, or perceived as having a physical or mental disability as well as individuals with relationships with people who have a qualified disability. Since the ADA currently applies to all employers of fifteen or more workers, U.S. colleges and universities are subject to its mandates. Professors who face discrimination under the ADA may sue their state college or university in order to obtain a court order that will stop their administration's illegal conduct. The EEOC may also sue colleges and universities for monetary damages on behalf of a professor. There are also state disability laws that protect you from employment discrimination. In some cases state laws may provide you with other options (e.g., you may be able to file a complaint with your state equal employment agency and sue in state court).

In understanding the interaction between the ADA and the FMLA it is important to note that not all "serious health conditions" defined under the FMLA will cause or be related to a disability, as that term is defined by the ADA. Under the ADA, you have a disability if you suffer from a mental or physical impairment that is not temporary and that substantially limits your ability to engage in major life activities (e.g., feeding yourself, bathing yourself, hearing, seeing, walking, speaking, breathing, etc.). If you suffer a serious health condition that causes such an impairment, the ADA requires your college or university to make reasonable accommodations to your work environment and/or to give you work assignments that will allow you as a qualified employee with a disability to continue to perform the essential functions of your position upon your return from FMLA leave.

Nothing in the FMLA diminishes the obligations imposed upon employers by federal or state antidiscrimination laws, including the ADA. Institutions are required to comply with whichever statute "provides the greater rights" to faculty members. § 825.702(a). Therefore, it is possible that a faculty member who takes twelve weeks of FMLA leave for his or her own serious health condition may still be entitled to additional leave as an ADA accommodation. The interaction between the FMLA, ADA, workers' compensation, and short-term disability leave is highly complex, and you should confer with your institution or your own lawyer about how those policies interact. Please be aware that upon expiration of your twelve weeks of FMLA leave, if the ADA is not triggered, any extension of leave is most likely governed by your institution's policies. You should check on how much extra time may be taken, how your benefits, such as health insurance, will be treated, what your reinstatement rights are, and so on. For more information about the ADA, see <http://www.eeoc.gov>.

1. **Question.** I am a full-time professor who was in an automobile accident that left me visually impaired. I will be able to return to my teaching job at the university, but upon my return I will need a special computer that costs $4,000. Before I was in the accident, I was volunteering as our athletic department's assistant gymnastics coach. I will no longer be able to perform this function. Am I entitled to job-protected leave under the FMLA or the ADA?

Answer. If your visual impairment rises to the level of a disability under the ADA, but still leaves you able to perform your essential job functions (i.e., teaching, research, and service) if provided with reasonable accommodation, then your institution must provide such accommodation to enable you to resume

work. However, an institution may decline to make an accommodation for your disability, if not reasonable or if the cost is so expensive or disruptive that it would impose an "undue hardship" on your university. A computer expenditure of $4,000 seems neither unreasonable nor likely to pose such an undue hardship for most colleges and universities. Although you may be unable to coach gymnastics, you were not hired to assume this responsibility as well as teach, and so coaching would not be considered an essential function of your faculty teaching position. To meet your service obligations, you could substitute for coaching gymnastics some other type of service (e.g., committee work or advising student clubs). § 825.702. The administration must work with you to identify these possibilities.

2. **Question.** I originally took twelve weeks of FMLA leave for my own serious health condition. This condition resulted in a long-term disability under the ADA that my institution has agreed to accommodate. However, our director of human resources insists that in order to return to work I must produce a medical certification detailing my overall physical condition. Must I provide the director so much information regarding my health?

Answer. No. When a professor with ADA-defined disabilities returns to work after an FMLA leave, the institution may only require that a simple fitness-for-duty certificate address aspects of the professor's physical condition that are job-related. For example, suppose an automobile accident leaves you with a severe hearing impairment that without accommodation will make it impossible for you to perform your teaching as a foreign-language instructor. In this case your human resources director may only ask you for medical information related to your hearing loss. The director may not ask you for other general or specific medical information that is unrelated to your ability to perform your job. § 825.310 & § 825.702(e).

As a second example, suppose your serious health condition resulted in the amputation of a leg and the administration is accommodating your disability by providing you a parking space closer to your office and a key to your office building's elevator. Assuming that with these accommodations you can perform your appointment functions (i.e., teaching, research, committee work), the administration may not ask for medical information related to the medical disability. § 825.310 & § 825.702(e).

3. **Question.** I have experienced a serious health condition for which I originally was granted twelve weeks of FMLA leave. The serious health condition has continued. I will eventually be able to perform all the essential functions of my position, but I will need four more weeks of leave for occupational therapy. Am I entitled to more leave, given that I have already used up my FMLA leave and all my accumulated sick leave?

Answer. Maybe. If the serious health condition doesn't qualify as a "disability," then the ADA will not apply. If, however, the serious health condition does rise to a "disability," then the ADA will apply. The ADA does not impose a time limit on how much leave your institution must provide you to recover from your disability if: (1) upon recovery you will be able to perform the

essential functions of your job; and (2) the amount of leave you need can be granted by your institution without causing it an undue hardship. Unless the institution can prove that giving you four more weeks of leave will cause the institution an undue hardship, you probably will be granted the additional four weeks of leave. § 825.702(b) & (c).

XIV. INTERACTION BETWEEN THE REHABILITATION ACT OF 1973 AND THE FMLA

The Rehabilitation Act provides the same protections as the ADA in that it protects employees with physical or mental disabilities from discrimination at work. The Rehabilitation Act covers only government employers (e.g., the federal military academies), employers who receive federal financial assistance, employers with federal government contracts, and federal employees. However, these categories include most colleges and universities. Nothing in the FMLA diminishes the obligations imposed upon colleges and universities by the Rehabilitation Act. They are required to comply with whichever statute provides the greater protection to faculty members. § 825.702. At the same time, however, an institution may reserve the right to have any short-term disability leave policy run concurrently with your FMLA leave. § 825.207.

XV. INTERACTION BETWEEN THE PREGNANCY DISCRIMINATION ACT OF 1978 AND THE FMLA

The Pregnancy Discrimination Act (PDA) amended Title VII of the 1964 Civil Rights Act to make it illegal for employers of fifteen or more workers to discriminate against women because of their pregnancies. Since the PDA applies to all employers of fifteen or more workers, all U.S. colleges and universities are subject to its mandates. The Equal Employment Opportunity Commission enforces the Pregnancy Discrimination Act. For more information on the PDA, see <http://www.eeoc.gov>.

Under the PDA, colleges and universities that offer short-term medical, sick, or disability leave must provide to pregnant women the same type of leave available to nonpregnant employees on the same terms and with at least the same level of benefits. For example, a college that provides up to three months of job-protected, paid medical leave after one month of an appointment must also provide a pregnant female professor with up to three months of job-protected, paid pregnancy-related medical leave after only one month of an appointment.

Newly appointed women faculty will often find that they qualify for maternity benefits under the PDA before they qualify for maternity leave benefits under the FMLA, because many colleges and universities have short-term medical leave policies that allow professors to accumulate job-protected, paid medical leave immediately. Moreover, to the extent that a college's medical leave plan provides for any period of paid leave, some of the benefits that a pregnant faculty member can obtain may be more generous under the PDA than under the FMLA. However, if you are pregnant and an FMLA-eligible employee, you may simultaneously exercise your rights to the benefits of both laws. Nothing in the FMLA diminishes the obligations imposed upon colleges and universities by the PDA. When PDA and FMLA mandates differ, college and university administrations are required to comply with whichever statute provides the greater benefits to faculty members. § 825.702. At the same time, however, an institution may reserve the right to have any short-term disability leave policy run concurrently with your FMLA leave. § 825.207.

1. **Question.** I am pregnant and the human resources director at my institution told me that my pregnancy disability leave runs concurrently with my FMLA leave. Is that true?

Answer. Maybe. Administrations may reserve the right to have any short-term disability policy run concurrently with your FMLA leave. § 825.207. You should review your faculty handbook to see if there is a clear policy on this issue. At the same time, if no established policy exists on this issue, you may request that your short-term disability leave run concurrently with your FMLA leave.

2. **Question.** My husband and I are both faculty members in the same department at our university. I am pregnant, and my due date is during the middle of the semester. My department chair says I can take FMLA leave, but only if my husband will teach a course overload by covering my classes during the time I am out on leave. My husband does not want to teach an overload. Can the department chair require this arrangement?

Answer. Probably not. Under the FMLA, your university may not "interfer[e] with, restrain[], or deny[]" any FMLA rights that are due to you. § 825.220(b). Accordingly, your department chair's requirement that your husband teach a course overload would appear to constitute the imposition on you of onerous conditions to discourage you from taking FMLA leave or otherwise to create a hardship for you.

Your husband may have more protection against being required to teach a course overload under the PDA than under the FMLA. The PDA requires that employers treat leaves taken for pregnancy-related reasons at least as favorably as short-term medical leaves taken for non-pregnancy-related reasons. Check your university's sick-leave policy or procedures. It is doubtful that a court would uphold a requirement that faculty spouses cover courses for their partners who take short-term medical leaves.

3. **Question.** I am a part-time faculty member, and although I have taught part-time at my university for five years, I do not work 1,250 hours per year and, therefore, do not qualify for FMLA leave. I am pregnant. Do I qualify for any type of maternity leave?

Answer. Maybe. Check your institution's short-term sick-leave policy, which should be detailed in your faculty handbook or related materials. Many colleges and universities enable part-time faculty to accumulate sick-leave benefits proportionately to the course load they teach. For example, if your university allows full-time faculty to accumulate one day of job-protected, paid sick leave per month of appointment, it may allow you, a part-time faculty member, to accumulate one-half day of job-protected sick leave per month. Accordingly, if this is the case at your university, for each year of employment you would earn six full days of paid sick leave and so, after five years, you would have accumulated thirty days of paid sick leave to use toward six weeks of paid maternity leave following the birth of your baby. The university could not deny you the right to use your sick leave for pregnancy-related disabilities.

XVI. Actions to Take When You Believe Your College or University Is Violating Your Rights to FMLA Leave

All employers covered by the FMLA, including colleges and universities, are prohibited against retaliating or interfering with or denying eligible employees, including professors, their right to FMLA benefits. Accordingly, higher education institutions are also not allowed to dismiss or discriminate in any way against a professor for opposing or complaining of any illegal practice under the FMLA. Under the FMLA, retaliation by employers is illegal so as to protect any employee, including a professor, who files a charge or who institutes or participates in (e.g., as a witness) any proceeding against a college or university related to denial of FMLA benefits.

1. Question. What are my options if my college denies my FMLA leave request?

Answer. If you believe your institution has violated your FMLA rights, you may file a complaint with the U.S. Department of Labor. § 825.400–401. You may file the complaint by mail, by telephone, or in person at a local office of the Wage and Hour Division of the U.S. DOL. You may check the DOL Web site for such information at <http://www.dol.gov>. The same procedures apply for any retaliatory action taken as well.

No particular form is required to file a complaint. Just make sure you include all of the administration's actions and omissions of which you are complaining and the relevant dates of these actions or omissions. Include copies of any supporting evidence, such as memoranda, correspondence, and so on.

The complaint should be filed within a reasonable time of your discovery that your FMLA rights may have been violated, but no later than two years after the action you are complaining of, or three years following the violation if the institution's violation was "willful." § 825.401.

Alternatively, you may file a private lawsuit in federal court against your institution for its denial to you of FMLA rights. Assuming your state university is not immune from such a suit, your lawsuit must be filed within two years of the last FMLA violation committed by your employer against you, or within three years if the violation was "willful." § 825.400.

2. Question. I think that my administration is denying me benefits under both the FMLA and the ADA (or the FMLA and the PDA, or the FMLA and the Rehabilitation Act). What are my options?

Answer. If you think your rights have been violated under the FMLA and other federal antidiscrimination laws, you may file a complaint with the U.S. Department of Labor as specified in Question 1 of this section. If you also have a complaint under the ADA or the PDA you will have to file additional complaints to enforce your rights under these laws. If your state or local government has an equal employment agency, you must first file your non-FMLA complaints with it.

While the EEOC provides forms for individuals who wish to file a complaint, informal complaints are also accepted. The complaint letter must provide the following information: (1) your name; (2) the name of the person or entity (i.e., college or university) that you are complaining against; (3) an explanation of the

nature of the discrimination; (4) the basis of the alleged discrimination (e.g., disability or pregnancy); and (5) the times and places the discrimination occurred.

If there is a state equal employment agency where you live, your complaint must be filed with your local district office of the EEOC within 300 days following the incident of discrimination that you are complaining of, or 30 days from the date when the state agency relinquishes jurisdiction, whichever date is earlier. If your state agency hasn't completed its investigation 60 days after receiving your complaint, you may then file a complaint with the EEOC. In states with no state equal employment agency you must file your complaint with the EEOC within 180 days following the incident of which you are complaining. Check the EEOC Web site <http://www.eeoc.gov> to find out the address of your district EEOC office .

While you may bring lawsuits to enforce your rights under the FMLA, ADA, and PDA, you may not bring separate suits when the same acts of your institution result in violations of more than one of these laws. You may file only one lawsuit that lists all the laws you believe your institution has violated. Additionally, you may not file a lawsuit under the ADA or the PDA (or any other part of Title VII of the 1964 Civil Rights Act) until the EEOC issues you a "right to sue" letter. If you are contemplating a lawsuit, be sure to consult an attorney familiar with employment law.

Conclusion

The application of the FMLA to the academic community is obviously complicated. Many questions remain unanswered. This manual attempts to provide some guidance, although at times tentative, on issues of concern to faculty. If you have questions about your own particular situation, confer with a lawyer in your jurisdiction who has experience in the practice of FMLA and in the world of academe.

Appendix I
Helpful Web Sites and Telephone Numbers

U.S. Department of Labor's FMLA toll-free telephone number: 1-800-959-FMLA

U.S. DOL's FMLA homepage and links:
<http://www.dol.gov/dol/esa/fmla.htm>

Helpful FMLA summary from the DOL:
<http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs28.htm>

DOL's FMLA Compliance Guide:
<http://www.dol.gov/dol/esa/public/regs/compliance/whd/1421.htm>

DOL's FMLA Advisor (online answers to FMLA questions):
<http://www.dol.gov/elaws/fmla.htm>

Text of the Family and Medical Leave Act of 1993:
<http://www.dol.gov/dol/esa/public/regs/statutes/whd/fmla.htm>

FMLA mandates explained in the *Code of Federal Regulations*
<http://www.dol.gov/dol/allcfr/esa/title_29/part_825/toc.htm>

DOL's link to FMLA posters for the work place:
<http://www.dol.gov/dol/esa/public/regs/compliance/posters/fmla.htm>

DOL's standard Medical Certificate Form:
<http://www.dol.gov/dol/esa/public/regs/compliance/whd/fmla/wh380.pdf>

DOL's sample employer notification form:
<http://www.dol.gov/dol/esa/public/regs/compliance/whd/fmla/wh381.pdf>

U.S. Equal Employment Opportunity Commission's Web Site:
<http://www.eeoc.gov>

The National Partnership for Women and Families' Web Site:
<http://www.nationalpartnership.org>

AFSCME's (American Federation of State, County, and Municipal Employees) general guide to the FMLA:
<http://www.afscme.org/wrkplace/fmla.htm>

For an overview of recent topics clarified in opinion letters issued by the DOL:
<http://www.lawatwork.com/news/addfmla/html>

For links to some FMLA-related cases and articles:
<http://www.benefitslink.com/framed/fmla.shtml>

For more information, call the national or local office of the DOL, Wage and Hour Division. To obtain more information on the FMLA, call the national U.S. Department of Labor at 1-800-959-FMLA.

Appendix II
Helpful Books and Other Print Resources

CCH Editorial Staff. *State Antidiscrimination Laws: Protected Classes, Disability Discrimination, Family and Medical Leave*. Chicago: CCH Inc., 1999.

Decker, Kurt H. *Family and Medical Leave in a Nutshell*. St. Paul, Minn.: West Group, 2000.

Duston, Robert L., and Scott Robins. *A Practical Guide to Implementing the FMLA*. Washington, D.C.: College and University Professional Association for Human Resources, 1993, 1996 Supp.

Flygare, Thomas J. *The Family Medical Leave Act of 1993: Applications in Higher Education*. Washington, D.C.: National Association of College and University Attorneys, 1995.

Gallagher, Maureen M. *Family & Medical Leave Act Compliance Guide*. Old Saybrook, Conn.: Business & Legal Reports, Inc., 2000.

Harvey, David S., Jr., *Mandated Family and Medical Leave: A Guide to FMLA and the State Laws*. New York: Aspen Publishers, 2000.

Miles, Albert S. et al., "The Family and Medical Leave Act of 1993: An Overview and Implications for Schools," *Education Law Reporter* 923 (1994).

National Employment Law Project, *The Family and Medical Leave Act: An Advocate's Guide*. New York: NELP, 1996.

Raisner, Jack A. *Pregnancy Discrimination and Parental Leave Handbook*. New York: Aspen Publishers, 2000.

Repa, Barbara Kate, and Amy Delpo. *Your Rights in the Workplace*. 5th ed. Nolo Press, 2000.

Schwartz, Robert M. *The FMLA Handbook: A Practical Guide to the Family and Medical Leave Act for Union Members and Stewards*. Cambridge, Mass.: Work Rights Press, 1996.

Susser, Peter. *Family and Medical Leave Handbook*. Washington, D.C.: Thompson Publishing Group, 2000.

Tabbert, Hahn, Earnest, Weddle & Starkey, P.C. Staff. *Guide to Understanding Sexual Harassment, the Americans with Disabilities Act and the Family and Medical Leave Act*. Indiana Business Information Services, 1998.

Thompson, Brenda B. *FMLA, ADA, and Workers Comp: Navigating the Treacherous Triangle*. Brentwood, Tenn.: M. Lee Smith Publishers, 2000.

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